Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

76-4591

In the

Supreme Court of the United States

OCTOBER TERM, 1976

COMMUNICATIONS WORKERS OF AMERICA, an unincorporated labor association,

Appellant,

v.

WESTERN ELECTRIC COMPANY, INCORPORATED, a New York corporation, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado, ALBERT F. MANGAN, in his capacity as a member of the Industrial Commission of the State of Colorado, and KENNETH C. RUSSELL, in his capacity as a member of the Industrial Commission of the State of Colorado, and THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado corporation,

Appellees.

JURISDICTIONAL STATEMENT
APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

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COMMUNICATIONS WORKERS OF AMERICA, an unincorporated labor association,

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v.

WESTERN ELECTRIC COMPANY, INCORPORATED, a New York Corporation, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado, ALBERT F. MANGAN in his capacity as a member of the Industrial Commission of the State of Colorado, and KENNETH C. RUSSELL, in his capacity as a member of the Industrial Commission of the State of Colorado, and THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado corporation,

Appellees.

JURISDICTIONAL STATEMENT

Appeal From the Supreme Court of the State of Colorado

The Appellant, Communications Workers of America,

respectfully submits the following Jurisdictional Statement in its appeal from the judgment of the Supreme Court of the State of Colorado dated July 7, 1976 and the opinion issued by the Supreme Court of the State of Colorado in connection with said judgment, dated June 7, 1976 and modified on July 6, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Colorado is, as of yet, unreported and appears in Appendix B hereto. The opinion of the District Court in and for the City and County of Denver is reported at 88 LRRM 3481 and appears in Appendix A hereto.

JURISDICTIONAL GROUNDS

The within is an appeal pursuant to 28 U.S.C. §1257(2) from the opinion of the Supreme Court of the State of Colorado issued initially on June 7, 1976 and modified on July 6, 1976 and the judgment arising therefrom dated July 7, 1976. The Supreme Court of the State of Colorado denied the Appellant Communications Workers of America's Petition for Rehearing and Supplemental Petition for Rehearing by an undated order of which the Appellant Communications Workers of America received notice on July 6, 1976. The Notice of Appeal herein was filed by the Appellant Communications Workers of America in the Supreme Court of the State of Colorado on July 19, 1976; an Amended Notice of Appeal was filed on September 9, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(2). Cases believed to sustain jurisdiction in this matter include *Huffman v. Pursue, Ltd.*, _____ U.S. _____, 95 S.Ct. 1200

(1975); *Cohen v. California*, 403 U.S. 15 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *LaCrosse Tel. Corp. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 18 (1949); *Reconstruction Finance Corp. v. Beaver County, Pa.*, 328 U.S. 204 (1946); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

The within appeal involves the constitutionality of 1973 C.R.S. §8-3-108(1)(c) of the Colorado Labor Peace Act as applied to employers and labor organizations in interstate commerce. 1973 C.R.S. §8-3-108(1)(c) is found at p. 334 of the Colorado Revised Statutes 1973. The text of the Colorado Labor Peace Act is set forth in Appendix C hereto. Sections 7, 8(a)(1), 8(a)(3), 9 and 14(b) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §§157, 158(a)(1), 158(a)(3), 159 and 164(b), are relevant to this appeal and are set forth in Appendix C hereto.

QUESTIONS PRESENTED BY THE APPEAL

1. May the State of Colorado pursuant to §14(b) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §164(b), require, as a condition precedent to the right to enter into a valid union security provision, all or part of a bargaining unit certified or recognized under the Labor Management Relations Act of 1947, as amended, to constitute itself as a "collective bargaining unit" in accordance with 1973 C.R.S. §8-3-104(4) of the Colorado Labor Peace Act?

2. May the State of Colorado pursuant to §14(b) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §164(b), require, as a condition precedent to the conduct of an "all-union" referendum under 1973 C.R.S. §8-3-108(1)(c), all or a portion of a bargaining unit certified or recognized under the Labor Management Relations Act of 1947,

as amended, to constitute itself as a "collective bargaining unit" in accordance with 1973 C.R.S. §8-3-104(4) of the Colorado Labor Peace Act?

3. May the State of Colorado pursuant to §14(b) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §164(b), require, as a condition precedent to the enforcement of a union security provision, the conduct of an "all-union" referendum under 1973 C.R.S. §8-3-108(1)(c) of the Colorado Labor Peace Act?

STATEMENT OF THE CASE

The within appeal is from the final judgment of the Supreme Court of the State of Colorado [hereinafter, Colorado Supreme Court] dated July 7, 1976. [App. B at 33] The initial opinion of the Colorado Supreme Court in this matter was issued on June 7, 1976. The Appellant Communications Workers of America [hereinafter, CWA] filed a Petition for Rehearing pursuant to C.A.R. 40 on June 16, 1976 [R.717][1] and a Supplemental Petition for Rehearing on June 29, 1976. [R. 729] CWA's Petition for Rehearing and Supplemental Petition for Rehearing were denied by an undated order of the Colorado Supreme Court. [App. B at 32] CWA received notice of such denial by letter dated July 6, 1976. [*Id.* at 34] CWA filed a Notice of Appeal pursuant to Rule 10 of this Court on July 19, 1976 and an Amended Notice of Appeal on September 9, 1976. [App. D at 1;4]

This appeal arises from two civil actions filed on August

[1]Simultaneously with the filing of the within Jurisdictional Statement, CWA has filed the Record in this matter. References to such Record shall be by reference to the page of the Record as assigned thereto by the Clerk of the Colorado Supreme Court and, where appropriate, to the name of the pleading or document referred to and paragraph number thereof. In such references the Record shall be refered to as "R."

4, 1970 in the District Court in and for the City and County of Denver [hereinafter, Colorado District Court] by CWA seeking, *inter alia*, a declaratory judgment pursuant to 1963 C.R.S. §77-11-1[2] and Colo.R.Civ.P. 57 that certain union security provisions[3] could be lawfully enforced in the State of Colorado. [App. B at 3-4] The first of such actions was assigned Civil Action No. C-18238 and named as defendants The Mountain States Telephone & Telegraph Company [hereinafter, Mountain States]; the State of Colorado, Department of Labor and Employment, Division of Labor [hereinafter, Department of Labor and Employment]; the Executive Director of the Department of Labor and Employment; the Industrial Commission of the State of Colorado [hereinafter, Industrial Commission]; and the individual members of the Industrial Commission in their official capacities. [R.5] The second of such actions was assigned Civil Action No. C-18239 and named as defendants the Western Electric Company, Inc. [hereinafter Western Electric] and the same agencies and officers of the State of Colorado as in Civil Action No. C-18238. [R.91][4] On March 21, 1972 the several parties to Civil Action No. C-18238 filed a Stipulated Record of Evidence and an attendant Rule 7 Affidavit, and by order dated March 24, 1972 these parties were permitted to submit an agreed case pursuant to Colo.R.Civ.P. 7(d).[5] [R.67-80] On March 27, 1973 the several

[2]This provision, under the Colorado Revised Statutes 1973, has been renumbered as §13-51-105.

[3]The term "union security provision(s)" shall be used herein as referring to any collective bargaining agreement provision requiring an employee covered thereunder to tender uniformly required, periodic dues and reasonable initiation fees to a labor organization as a condition of continued employment after the thirtieth day of such employment.

[4]The Complaints in both civil actions were subsequently amended [R. 34; 122], but such amendments are of no moment to the within appeal.

[5]Colo.R.Civ.P. 7(d) reads in material part:

". . .Parties to a dispute which might be the subject of a civil

(Continued on Page 6)

parties to Civil Action No. C-18239 filed a Stipulated Record of Evidence [R.162], a Rule 7 Affidavit [R.160], and a Joint Motion to Consolidate Civil Action No. C-18239 with Civil Action No. C-18238 [R.154]; on that same date the parties to Civil Action No. C-18238 filed a Stipulation Concerning Consolidation [R.81] consenting to the consolidation of the two civil actions. The Colorado District Court before which Civil Action No. C-18239 was pending approved that matter for consolidation with Civil Action No. C-18238 by order dated March 27, 1973 [R.157], and on that date such civil action was approved as an agreed case pursuant to Colo.R.Civ.P. 7(d) [R.158].

In each of the Stipulated Records of Evidence the parties agreed, *inter alia*, that no "all-union" referendum had been conducted by the Colorado Division of Labor as contemplated in 1963 C.R.S. §80-4-6(1)(d)[6] and that "a justiciable controversy exists between the plaintiff and the several defendants concerning the application of [certain union security provisions] in the State of Colorado since a controversy has arisen between the plaintiff and the defendants as aforesaid, concerning the scope of the alleged prohibitory or regulatory provisions of the Colorado Labor Peace Act, C.R.S. §80-4-1, *et seq.* (1963) as amended, and the effect of such statutory scheme upon the construction of said provisions as between the plaintiff and defendant[s], [Mountain States and Western Electric]." [R.72, 73-74; 168, 171] The union security provisions

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action may, without pleading, file, in the court which would have had jurisdiction if an action had been brought, an agreed statement of facts. The same shall be supported by an affidavit in good faith to determine the rights of the parties. The matter shall then be deemed an action at issue and all proceedings thereafter shall be as approved by these rules."

[6]This provision in the Colorado Revised Statutes 1973 has been renumbered as §8-3-108(1)(c).

referred to above were contained in seven different collective bargaining agreements. Three of these collective bargaining agreements ran between CWA and Mountain States; the remaining four ran between CWA and Western Electric.

The three CWA-Mountain States agreements were: (1) the May 9, 1968 - May 8, 1971 Plant Department Agreement [hereinafter, 1968 Mountain States Plant Agreement];[7] (2) the May 9, 1968 - May 8, 1971 Traffic Department Agreement [hereinafter, 1968 Mountain States Traffic Agreement];[8] and (3) the July 18, 1971 - July 17, 1974 Plant and Traffic Departments Agreement [hereinafter, 1971 Mountain States Agreement].[9] The four collective bargaining agreements between CWA and Western Electric were: (1) the May 1, 1968 - April 30, 1971 Agreement denominated as Contract CWA-12;[10] (2) the May 1, 1968 - April 30, 1971 Agreement denominated as Contract CWA-JC-12;[11] (3) the July 18, 1971 - July 17, 1974 Agreement denominated as Contract CWA-13; and (4) the July 18, 1971 - July 17, 1974 Agreement denominated as Contract CWA-JC-13.[12]

The union security provision contained in the 1968 Mountain States Plant Agreement read:

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[7]The 1968 Mountain States Plant Agreement is annexed as Exhibit A to the Stipulated Record of Evidence in Civil Action No. C-18238.

[8]The 1968 Mountain States Traffic Agreement is annexed as Exhibit B to the Stipulated Record of Evidence in Civil Action No. C-18238.

[9]The 1971 Mountain States Agreement is annexed as Exhibit C to the Stipulated Record of Evidence in Civil Action No. C-18238.

[10]Contract CWA-12 is annexed as Exhibit 1 to the Stipulated Record of Evidence in Civil Action No. C-18239.

[11]Contract CWA-JC-12 is annexed as Exhibit 2 to the Stipulated Record of Evidence in Civil Action No. 18239.

[12]Contracts CWA-13 and CWA-JC-13 are contained in the single document annexed as Exhibits 6 and 7 to the Stipulated Record of Evidence in Civil Action No. C-18239.

"ARTICLE 14

Maintenance of Dues

14.1 Each employee who is a member of the Union on or after the 30th calendar day following the beginning of his employment or on or after the effective date of this Agreement, whichever is the later, shall as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the termination of this Agreement, except that each such employee may, within the 10-day period immediately preceding May 9, 1971, upon which date the Agreement terminates, terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company in writing of his withdrawal from membership in the Union.

14.2 Said condition of employment shall reapply to any such employee after his return to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

14.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such state.

14.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article." [App. B at 5-6]

The union security provision contained in the 1968 Mountain States Traffic Agreement was substantively the same as that in the 1968 Mountain States Plant Agreement. [App. B at 6-7] These union security provisions were modified in the 1971 Mountain States Agreement to read as follows:

"ARTICLE 21

Modified Agency Shop

21.1 Each regular employee who is a member of the Union on the date of ratification or approval of this agreement by the President of the Union, whichever is later, or who later becomes a member of the Union and all regular employees hired on or after that date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of regular employees hired on or after such date of ratification or approval, 30 days after hire, whichever of these dates is later until the termination of this contract, except that an employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his withdrawal from membership in the Union by registered mail, return receipt requested, and postmarked within the ten-day calendar period immediately preceding 11:59 P.M., July 28, 1971.

21.2 Said condition of employment shall reapply to any such employee after returning to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of

absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following return to the bargaining unit.

21.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such state.

21.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article." [*Id.* at 8-9]

The union security provisions in the several Western Electric agreements closely paralleled those quoted above. In Contract CWA-12 the union security provision read:

"ARTICLE 24

Maintenance of Union Dues

1. Each Employee who is a member of the Union:

(a) on or after the 30th calendar day following the beginning of his employment, or

(b) on or after the effective date of this contract whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this contract, except that each such Employee may, within the ten (10) day period immediately preceding the termination date of this contract, terminate his obligations to tender periodic Union dues to the Union as a condition of

employment by notifying both the Union and the Company of his withdrawal from membership in the Union.

1.1 Said condition of employment shall reapply to any such Employee after his return to the bargaining unit following any period of formal separation* therefrom, provided such Employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

*Includes:
Transfers out of the bargaining unit.
Removal from the payroll of the Company.
Leaves of Absence of more than one (1) month duration.

2. The provision of this Article 24 shall not be effective if inconsistent with the law of the applicable State.

3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this Article 24." [*Id.* at 10-11]

The union security provisions in Contract CWA-JC-12 were substantively the same as those in Contract CWA-12. [*Id.* at 11-12] In 1971 the union security provisions of Contract CWA-12 were amended to read as follows in Contract CWA-13:

"ARTICLE 24

Union Security

1. Each Employee who is a member of the Union on the date of ratification or approval of this Contract by

the President of the Communications Workers of America, whichever is later, or who later becomes a member of the Union and all Employees hired on or after such date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of Employees hired on or after such date of ratification or approval, thirty (30) days after hire, whichever of these dates is later until the termination of this Contract, except that an Employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable his or her withdrawal from membership in the Union, by registered mail, return receipt requested, and postmarked within the ten (10) day calendar period immediately preceding 11:59 P.M. July 21, 1971.

2. The condition of employment specified in Paragraph 1 shall not apply during the periods of formal separation* from the bargaining unit by any such Employee but shall reapply to such Employee on the thirtieth (30th) day following his or her return to the bargaining unit.

> *The term 'formal separation' includes transfers out of the bargaining unit, removal from the payroll of the Company and Leaves of Absence of more than one (1) month duration.

3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this article.

4. This article snall apply only in those States and the District of Columbia where the law permits the Union

> to enter into this type of union security agreement. If during the term of this Contract the Union shall become duly authorized under the laws of any other State to enter into this type of union security agreement, the effective date of this article as to Employees in such State shall be the date upon which the Company receives proper written evidence from the Union that is fully qualified to enter into such an agreement in such State." [*Id.* at 13-15]

Again, the union security provisions in Contract CWA-JC-13 were substantively the same as those in Contract CWA-13. [*Id.* at 15-16]

It is undisputed that Mountain States and Western Electric are engaged in commerce and are subject to the Labor Management Relations Act of 1947, as amended [hereinafter, federal Act], 29 U.S.C. §141 *et seq*. Mountain States is a Colorado corporation doing business in the States of Arizona, Colorado, Idaho, Montana, New Mexico, El Paso County, Texas, Utah and Wyoming. [R.67] The geographical scope of the several Mountain States Agreements is almost as broad as that of Mountain States itself.[13] Western Electric is a New

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[13]Article 1.1 of the 1968 Mountain States Plant Agreement recognized "the Union as the exclusive bargaining agent for all eligible employees in the Plant Department in the States of Arizona, Colorado, Idaho, New Mexico, Utah, Wyoming, and El Paso County, Texas whose titles are included in the list of job titles contained in Appendix B, attached hereto. . . ." Article 1.1 of the 1968 Mountain States Traffic Agreement provided that Mountain States recognized CWA "as the exclusive bargaining representative for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment, for all of the eligible non-supervisory employees in the Traffic Department of the Company as listed by titles and wage rates in Attachment B of this Agreement in the States of Arizona, Colorado, Idaho, New Mexico, Utah, Wyoming, and El Paso County,

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York corporation duly authorized to do business in the State of Colorado "as the manufacturing and supply unit of the Bell System and, as such, manufactures, supplies and furnishes services and materials to Bell System Associated companies in all of the States of the United States of America, including [Mountain States]...." [R.163] The several Western Electric contracts at issue cover a broad geographical area encompassing much of the United States.[14] It is further stipulated that CWA is the certified bargaining representative of the employees covered under the several Western Electric contracts at issue. [R.162-63][15] It is also undisputed that both Mountain States and Western Electric have refused and/or have failed to enforce the several union security provisions quoted above as to their Colorado employees because of certain provisions of the Colorado Labor Peace Act [hereinafter, Labor Peace Act], 1973 C.R.S. §8-3-101 *et seq.*[16] [App. B at 8,13].[17]

Texas...." Article 1.1 of the 1971 Mountain States Agreement provided that Mountain States recognized CWA as the exclusive bargaining representative for the employees covered under such Agreement in the States of Arizona, Colorado, Idaho, New Mexico, Utah, Wyoming, and El Paso County, Texas. Additionally, Article 1.1 of the 1971 Mountain States Agreement provided that Mountain States recognized CWA as the exclusive bargaining agent for certain employees in the State of Montana.

[14]See Contract CWA-12 at Article 12 and Appendix 1; Contract CWA-JC-12 at Article 11 and Appendix 2; Contract CWA-13 at Article 12 and Appendices 2, 3 and 4; and Contract CWA-JC-13 at Article 11 and Appendices 2 and 3.

[15]See Contract CWA-12 at p. 1; Contract CWA-JC-12 at p. 1; Contract CWA-13 at p. 1; and Contract CWA-JC-13 at p. 1.

[16]All references herein to the Labor Peace Act shall be, unless otherwise noted, to its recompilation in Colorado Revised Statutes 1973.

[17]The Stipulated Record of Evidence in Civil Action No. C-18238 provided that Mountain States refused CWA's demand that certain employees covered under the 1968 Plant and Traffic Agreements be discharged for failure to comply with the union security provisions therein because such "provisions were of no effect in light of the provisions of the...Labor Peace Act...." [R.72] See also, Appendix B at 8. The Stipulated Record of Evidence in Civil Action No. C-18239 provided that Western Electric refused to dismiss certain employees upon

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CWA argued, *inter alia*, before the Colorado District Court that the "all-union" referendum provisions of the Labor Peace Act were not intended to extend to the union security provisions at issue, to the federally recognized bargaining units involved or to any federally recognized bargaining units.[18] If, however, the Labor Peace Act were deemed to so extend, CWA urged that the "all-union" referendum provisions were unconstitutional. The Colorado District Court rejected both contentions. It held that the "all-union" referendum provisions were intended to reach federally recognized bargaining units and that such provisions could be constitutionally applied:

> "...The provisions of the...Labor Peace Act...apply to union security clauses in collective bargaining agreements negotiated by multi-state employers engaged in interstate commerce and doing business within the State of Colorado and to national labor organizations whenever the collective bargaining agreement in issue is applicable to a local union operating or headquartered within the State of Colorado....To rule otherwise in this case would invalidate sub silentio the Congressional intent implicit in

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the demand of CWA because of their failure to comply with the union security provisions in Contracts CWA-12 and CWA-JC-12 since "'[c]ertain provisions of the laws of the State of Colorado prohibited an employer from entering into an agreement with representatives of its employees which provides for union security unless the Industrial Commission of Colorado certifies that three-quarters or more of the bargaining unit employees voting in a referendum shall have voted affirmatively in favor of such an agreement.'" [R.167] See also, Appendix B at 13.

[18]The term "federally recognized bargaining unit" as used herein shall mean an employee unit appropriate for collective bargaining within the meaning of §9 of the federal Act, 29 U.S.C. §159, which status has been secured either through certification of the National Labor Relations Board [hereinafter, NLRB] or through voluntary recognition by the employer. See, *National Labor Rel. Bd. v. Gissel Packing Co.*, 395 U.S. 575, 595-97 (1969).

the Wagner Act and Section 14(b) of the National Labor Relations Act and render impotent the power of the State of Colorado validly exercised in the. . .Labor Peace Act to regulate union security and to preserve the rights of employees within the boundaries of the State of Colorado. No such conclusion was intended by the drafters of the Wagner Act, and therefore, this Court concludes that the. . .Labor Peace Act is applicable to collective bargaining agreements, including those in issue here, executed between employers and labor organizations subject to the National Labor Relations Act in all areas, including union security, reserved specifically to the states by the National Labor Relations Act." [App. A at 24]

The Colorado District Court had earlier held that the regulation of union security provisions by the Labor Peace Act was not preempted by the federal Act:

". . .Neither the National Labor Relations Act, the Taft-Hartley Amendments, nor any other federal legislation has operated to preempt the provisions of the. . .Labor Peace Act regulating union security clauses as 'all-union' agreements requiring an 'all-union' referendum as a prerequisite to their validity. . . .The State of Colorado retains jurisdiction to prohibit or regulate all such union security clauses beginning with their 'actual negotiation and execution.' . . .The Colorado Supreme Court. . .also concluded that resolution of the question of the union security had always been left totally to the states, including the State of Colorado, and that the State of Colorado had chosen to regulate union security through the vehicle of the. . .Labor Peace Act." [*Id.* at 21-22]

The Colorado District Court's opinion and judgment were

rendered on September 9, 1974. [*Id.* at 42] On October 7, 1974 CWA filed a Notice of Appeal to the Court of Appeals for the State of Colorado [hereinafter, Colorado Court of Appeals]. [R.224] On March 4, 1975 CWA filed a Petition for Writ of Certiorari in the Colorado Supreme Coure requesting that, pursuant to C.A.R. 50, certiorari issue to the Colorado Court of Appeals prior to judgment by that Court. [R.599] On March 12, 1975 the several parties to the appeal filed a Joint Motion to the Court of Appeals to Request Transfer of Appeal to the Supreme Court. [R.377] By order dated March 20, 1975 the Colorado Court of Appeals referred the appeal to the Colorado Supreme Court pursuant to §§13-4-109 and 110 and requested the Colorado Supreme Court to determine the question of jurisdiction thereunder. [R.598] After consideration of the request of the Colorado Court of Appeals and CWA's Petition for Writ of Certiorari, the Colorado Supreme Court accepted jurisdiction over the appeal by order dated March 27, 1975. [R.679]

At the time of the Colorado Supreme Court's assumption of jurisdiction over the appeal, all briefs of the parties and the several *amicii curiae* had been filed except CWA's Reply Brief tendered to the Colorado Court of Appeals on March 28, 1975. [R.642] CWA argued, as before the Colorado District Court, that the "all-union" referendum provisions of the Labor Peace Act were not intended to extend to federally recognized bargaining units or to the union security provisions at issue but that, if the Labor Peace Act were construed to so extend, its "all-union" referendum provisions were unconstitutional. [R.301, 308-25 (Opening Brief at 10, 17-34); R. 654-61 (Reply Brief at 7-14)] CWA contended, *inter alia*, that an "all-union" referendum could only be conducted within the confines of a "collective bargaining unit" as defined in §8-3-104(4). [R.301-04 (Opening Brief at 9-12); R.649-54 (Reply Brief at 2-7)]

Because requirements for "collective bargaining unit" status differed from those giving rise to federally recognized bargaining unit status, CWA argued that the "all-union" provisions impermissibly infringed upon §7 rights of employees under the federal Act and upon §9 authority of the NLRB. [R.303-08, 309-17 (Opening Brief at 12-17, 18-26); R.652, 654-56 (Reply Brief at 5, 7-9)] CWA also contended that the Labor Peace Act's complex regulatory scheme fell without the scope of §14(b) of the federal Act, 29 U.S.C. §164(b), which, CWA argued, permits states to prohibit, but not regulate, the application of union security provisions. [R.317-19 (Opening Brief at 26-28); R.657-61 (Reply Brief at 10-14)] The Colorado Supreme Court concurred in CWA's contention that an "all-union" referendum could only be held among the employees of a "collective bargaining unit" and further held that "collective bargaining unit" status was a condition precedent to any labor organization's right to enter into an "all-union agreement:"

"...In our opinion, the statute plainly directs that the referendum should be conducted among the employees of a collective bargaining unit....

"All of the bargaining units involved in this appeal have been recognized or certified by the National Labor Relations Board, and no evidence suggests that any of them were established by a secret ballot election pursuant to §[8-3-104(4)]. In our view, a secret ballot election, as described by §[8-3-104(4)], is the exclusive method by which a collective bargaining unit subject to the 'all-union' referendum provisions of §[8-3-108(1)(c)] may be recognized. Correlatively, we hold that a collective bargaining unit, as defined by §[8-4-104(4)], is a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law. Inasmuch as no secret ballot election was conducted for the purpose of establishing a collective bargaining unit authorized to enter into an all-union agreement with Mountain States and Western Electric, C.W.A. is not entitled to the enforcement of the all-union agreement provisions which are, in our opinion, invalid. Even if such an election had been held and an appropriately authorized collective bargaining unit had been established, the union security provisions here in issue would be invalid and unenforceable because of the lack of employee approval through an all-union referendum." [App. B at 22-23]

The Colorado Supreme Court concurred in CWA's contention that certification or recognition requirements under the federal Act differed from those attendant to "collective bargaining unit" status:

"We agree that certification or recognition under the Federal Act is different than the recognition/definition section of the Colorado Labor Peace Act. The Colorado Labor Peace Act requires a secret ballot election conducted by the Division of Labor in which a majority of the employees of the employer or a majority of the employees in a craft must vote." [*Id.* at 24]

However, it is disagreed with CWA's argument that the requirement of "collective bargaining unit" status, as incorporated in §8-3-108(1)(c), vitiated the constitutionality of the Labor Peace Act's "all-union" referendum provisions:

"The issue of a state's power to recognize or certify collective bargaining units must not be confused with a state's power to regulate union-security agreements. In Algoma Plywood and Veneer Co. [v. Wisconsin Emp. Rel.

Bd., 336 U.S. 301 (1949)], the United States Supreme Court held that '[t]he character of activities left to State regulation is not changed by the fact of certification.' We agree. In Colorado, a 'collective bargaining unit' for purposes of the union security agreement provision of the Colorado Labor Peace Act, may be something different than a collective bargaining unit for other purposes of labor-management relations. In the context of §[8-3-108(1)(c)], a collective bargaining unit is a unique entity which may only be established pursuant to the requirements of §[8-3-104(4)]. Viewed as such, the procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit the application of union security agreements under the permissive grant of authority contained in §14(b) of the Taft-Hartley Act. The application of §[8-3-104(4)] to the union security provisions of the Colorado Labor Peace Act is severable from its application in other contexts of the Act.

A valid all-union agreement may only be entered after the establishment of a collective bargaining unit in accordance with §[8-3-104(4)]. Having failed to properly define such collective bargaining units prior to entering the agreement here in issue, C.W.A. cannot properly demand that the employers enforce these invalid agreements." [*Id.* at 28-29]

The Colorado Supreme Court also disagreed with CWA's contention that the regulatory scheme of the "all-union" referendum provision of the Labor Peace Act fell without §14(b):

"C.W.A. contends that states, pursuant to §14(b), are allowed to 'prohibit' but not to 'regulate' union security agreements. No matter how this distinction may be interpreted, §14(b) does allow states to prohibit the 'application' of union security agreements. . . .

• • •

"In short, Colorado was entitled under §14(b) to enact §[8-3-108(1)(c)] of the Colorado Labor Peace Act, and the state's power to prohibit the application of the union security provision here in issue is not preempted by federal law." [*Id.* at 29,30]

As the above would indicate, the Colorado Supreme Court found the "all-union" referendum provisions of the Labor Peace Act applicable "to union security clauses in collective bargaining agreements negotiated and executed by multi-state employers engaged in interstate commerce and doing business in Colorado." [*Id.* at 31] It concluded:

"Accordingly, we hold that the disputed clauses of the collective bargaining agreements between C.W.A. and Mountain States and between C.W.A. and Western Electric are union security clauses subject to state control under the Colorado Labor Peace Act. As enacted, the clauses were invalid because they were not approved through an all-union referendum by an appropriately designated employee group. C.W.A. may not rely on these clauses to effectuate a discharge of an employee refusing to comply with the terms thereof. Mountain States and Western Electric lawfully refused C.W.A.'s demands that the employees be discharged." [*Ibid.*]

Mr. Chief Justice Pringle of the Colorado Supreme Court dissented from the above opinion. In relevant part, Mr. Chief Justice Pringle stated:

"I think there is no disagreement that the National Labor Relations Act, as amended, preempts labor relations from state regulation except when such is specifically authorized by the Act itself. Section 14(b) of the Taft-Hartley amendment does provide that states may *prohibit,* and I emphasize the word used is *prohibit,* the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory. It does not, in its express language, allow states to regulate or do anything other than prohibit such agreements.

• • •

"I know the time-worn legal cliche that whatever a state can prohibit it can regulate. But this is not the situation for its application. We are here dealing with original pre-emption of the entire field by the federal government and the cession back to the states of a portion of that field. As I have pointed out, the history of that cession does not permit this court to reach out, as I think it does here, to grant the state powers not expressly given it by the Act itself. . . ." [*Id.* at 31-32] [Emphasis in original]

GROUNDS SHOWING SUBSTANTIAL FEDERAL QUESTIONS

THE WITHIN APPEAL RAISES SUBSTANTIAL FEDERAL QUESTIONS CONCERNING THE SCOPE OF §14(b) OF THE FEDERAL ACT, WHICH SHOULD BE RESOLVED BY THIS COURT BECAUSE OF THE SERIOUS PREEMPTION ISSUES PRESENTED BY THE COLORADO SUPREME COURT'S DECISION HEREIN.

As noted above, the Colorado Supreme Court rejected CWA's several preemption arguments concerning the "all-union" provisions of the Labor Peace Act on the basis of its expansive reading of §14(b) of the federal Act. Thus, "the procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit application of union security agreements under the permissive grant of authority contained in §14(b) of the Taft-Hartley Act." [App. B at 28-29] "No matter how this distinction [between state statutes prohibiting union security provisions and those regulating union security provisions] may be interpreted, §14(b) does allow states to prohibit the 'application' of union security agreements." [*Id.* at 29] "In short, Colorado was entitled under §14(b) to enact §[8-3-108(1)(c)] of the Colorado Labor Peace Act, and the state's power to prohibit the application of the union security provisions here in issue is not preempted by federal law." [*Id.* at 30] CWA submits that the Colorado Supreme Court's decision herein constitutes a far broader construction of §14(b) than accorded under any decision of this Court interpreting such provision. CWA further submits that the Colorado Supreme Court's construction of §14(b) raises substantial questions concerning the degree, if any, to which a state may regulate the negotiation and application of union security provisions between labor organizations and employers subject to the federal Act when such regulation results in infringement upon rights guaranteed under §7 of the federal Act and upon the exclusive authority of the NLRB under §9.

The uniqueness of the Labor Peace Act's operation is apparent from a review of the Colorado Supreme Court's decision herein. However, a brief analysis of the Labor Peace Act's statutory framework is useful in developing the substantial federal questions at issue herein.

A. *The Statutory Scheme of the Labor Peace Act.*

The Labor Peace Act is a complex statute. The source of much of its complexity lies in §8-3-104 which defines various terms used throughout the statute in a highly specialized manner. Perhaps the most important of these definitions is that of a "collective bargaining unit":

> "... 'Collective bargaining unit' means an organization selected by secret ballot, as provided in §8-3-107, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such a unit, except that, where a majority of the employees engaged in a single craft, division, department, or plant have voted by secret ballot that the employees of such single craft, division, department or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or [representatives][19] where a majority of the employees in each separate unit have voted to do so by secret ballot, as provided in §8-3-107."

The term "collective bargaining unit" is integral to the entire operation of the Labor Peace Act because, as reflected in several provisions throughout the statute, no collective bargaining obligations can arise unless and until a "collective bargaining unit" exists. Thus, §8-3-104(3) defines the term "collective bargaining" in the following manner:

> "... 'Collective bargaining' means negotiation by an

[19]It would appear that in the recompilation of the Labor Peace Act in the Colorado Revised Statutes 1973 the word "representatives" was inadvertently deleted from §8-3-104(4). Compare 1963 C.R.S. §80-4-2(6), with §8-3-104(4).

> employer and the representatives of a majority of its employees *who are in a collective bargaining unit* or their representatives concerning representation or terms and conditions of employment of such employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation." [emphasis supplied]

It is deemed an unfair labor practice in §8-3-108(1)(d) for an employer to refuse to bargain collectively with representatives of its employees in any "collective bargaining unit." It is, therefore, not surprising that the term "'all-union agreement' means an agreement between an employer and a *collective bargaining unit* representing some or all of his employees, whereby all of the employees of an employer in a craft or an establishment are required to be members of a single labor organization." Section 8-3-104(1) [emphasis supplied]. Consequently, before an "all-union agreement" can be negotiated, a "collective bargaining unit" must exist, and it is only in such "collective bargaining unit" that an "all-union" referendum may be conducted pursuant to §8-3-108(1)(c). See, Appendix B at 23,29.

It is further clear that only Colorado employees of an employer may populate a "collective bargaining unit." This is reflected both in the definition of "collective bargaining unit" and in the definition of "employee" in §8-3-104(11)(a).

It is important to recognize that a "collective bargaining unit" is a group of employees; it is, conversely, not a labor organization. The "collective bargaining unit" is, further, the bargaining representative of the employees in such unit. A "collective bargaining unit" can presumably designate a labor

organization as its "representative,"[20] but there is no requirement that it do so. Consequently, certification of a "collective bargaining unit" determines only that the employees in such unit desire to bargain collectively with their employer.

Section 8-3-104(4) requires that a "collective bargaining unit" be selected by a secret ballot "as provided in §8-3-107." A review of the procedures contained in §8-3-107 indicates that such provision is, indeed, *sui generis*, and it need only be briefly noted that the determination of appropriate unit status by the NLRB under §9 of the federal Act is effected in a substantially different fashion than under §8-3-107. Thus, the Labor Peace Act imposes more stringent vote requirements for certification as a "collective bargaining unit" than the federal Act does for the certification of a labor organization as the representative of a group of employees in an appropriate unit.[21] Under the federal Act the NLRB determines whether a given craft, department or plant is a unit appropriate for purposes of collective bargaining. See, e.g., *Mallinckrodt Chem. Works*, 162 NLRB 387 (1966); *Western Light & Tel. Co.*, 129 NLRB 719 (1960); *Sanborn Tel. Co.*, 140 NLRB 512 (1963); *Michigan Bell Tel. Co.*, 192 NLRB 1212 (1971); *Mountain*

[20]Section 8-3-104(17) defines "representative" as "any person who is the duly authorized agent of a collective bargaining unit." The term "person" is defined in §8-3-104(16) as "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers." Thus, a labor organization can constitute a "person."

[21]The Labor Peace Act requires that a majority of the employees in the putative "collective bargaining unit" vote for certification of such unit and that, further, a majority of those employees so voting approve the proposed "collective bargaining unit." See, §§8-3-104(4) and 8-3-107(1); App. B at 24. Under the federal Act a labor organization may be certified as the representative of an appropriate unit of employees if so designated by a majority of those valid votes cast in the representation election. Moreover, under the federal Act a labor organization can be recognized as the collective bargaining representative of a group of employees voluntarily and without the need of NLRB certification. *National Labor Rel. Bd. v. Gissel Packing Co., supra.*

States Tel. & Tel. Co., 220 NLRB No. 79 (1975). In contrast, the Labor Peace Act places substantially more emphasis on the desires of the affected employees than does the federal Act. Cf., *LaCrosse Tel. Corp. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 18, 25 (1949); see also, *Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry*, 146 Colo. 31, 360 P.2d 446, 449 (1961). Under the federal Act, moreover, challenge to the eligibility of an employee to vote in a representation election must be effected at the time of voting and not, as under the Labor Peace Act, prior to the election. Compare, *Graham Furn. Co. v. Industrial Comm'n*, 138 Colo. 244, 331 P.2d 507, 510 (1958), with 29 C.F.R. §102.69 (1975). Therefore, it is manifest that the NLRB certification procedure under §9 of the federal Act is, as a general matter, substantially disharmonious with the "collective bargaining unit" election requirements of §8-3-107. It would, thus, appear that an independent "collective bargaining unit" election will be required for a federally recognized bargaining unit to be permitted to enter into an "all-union agreement" and to participate in an "all-union" referendum.[22]

[22]This fact is obviously not without practical significance. Because the unit determination procedures under the Labor Peace Act and the federal Act differ, there is no assurance or, more importantly, no requirement that the "collective bargaining unit" be coterminous with those Colorado employees in a federally recognized bargaining unit. Thus, the possibility for certification of "collective bargaining units" which differ from the Colorado scope of the federally recognized bargaining unit is not only possible but, in many instances, likely because of the "strong policy in the Labor Peace Act in favor of fractional representation of the employees of one employer." *Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry, supra*, 360 P.2d at 449. Moreover, because each "collective bargaining unit" can designate its own "representative," it would appear possible for a minority union to be so designated. Consequently, there exists the possibility for groups of employees within the same federally recognized bargaining unit to be represented for the purpose of entering into an "all-union agreement" by two or more labor organizations.

B. *The Substantial Federal Questions Raised Herein.*

The substantial nature of the federal questions involved herein are apparent from the above review of the Colorado Supreme Court's decision and of the statutory framework of the Labor Peace Act. Summarized, the Colorado Supreme Court has held that, before a union security provision may be entered into and before an "all-union" referendum pursuant to §8-3-108(1)(c) may be conducted, the employees affected thereby must, within the strictures of §8-3-104(4), constitute themselves as a "collective bargaining unit." Thus, the Colorado Supreme Court held that, in the absence of any showing that the Colorado employees in the federally recognized bargaining units in this appeal have constituted themselves as a "collective bargaining unit" in accordance with §8-3-104(4), CWA had no *right* to enter into an "all-union agreement" with Mountain States or Western Electric. Further, it is clear, as developed above, that the Colorado Supreme Court validated its determination in this regard upon its construction of §14(b) of the federal Act.

Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 105 (1963) [hereinafter, *Schermerhorn* II], definitively established that "state power, recognized by §14(b), begins *only with the actual negotiation and execution of the type of agreement described by §14(b).*" [emphasis in original]. Accordingly, states may not regulate conduct prior to the negotiation of a union security provision. Cf., *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, – U.S. –, 96 S.Ct. 2140 (1976).[23] In-

[23]In *Mobil Oil* the Court held that "§14(b)'s primary concern is with state regulation of the post-hiring employer-employee-union relationship." *Id.*, 96 S.Ct. at 2146. Thus, *Mobil Oil* reinforces the notion that §14(b) was not concerned with any aspect of the collective bargaining relationship between an employer and a labor organization until

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stantly, however, the Colorado Supreme Court has determined that, irrespective of when the state regulation at issue occurs, a state may in all situations proscribe the *application* of a given union security provision prohibited by state law. Such reasoning would appear clearly circuitous,[24] and, if sustained, it permits states to regulate matters directly related to the actual negotiation of union security provisions, *i.e.*, those federally recognized bargaining units, or portions thereof, which may enter into a valid "all-union agreement." Thus, the Colorado Supreme Court's decision clearly raises the question of how broadly, if at all, a state may regulate the negotiation and application of union security provisions pursuant to §14(b) of the federal Act. While CWA believes *Schermerhorn* II is dispositive of the issue instantly, the Colorado Supreme Court, relying in part on that decision, has held otherwise. [App. B at 28] Consequently, an important federal question is presented as to the scope of §14(b) as construed, *inter alia*, by *Schermerhorn* II.

Flowing from the Colorado Supreme Court's construction of the Labor Peace Act are the incidental effects of that statute's regulation of union security matters on other rights secured under and/or provisions of the federal Act. As construed, the Labor Peace Act prescribes not merely those kinds of union security provisions which may be validated by an "all-

such time an employee is sought to be discharged pursuant to a union security provision. The mere presence of a union security provision is necessarily premised upon a pre-existing collective bargaining relationship which, *Mobil Oil* implicitly holds, is outside "§14(b)'s primary concern."

[24]The "application" of the union security provisions at issue can only be restrained if the provisions themselves are invalid under the Labor Peace Act. The provisions *are* invalid under the Labor Peace Act, as construed by the Colorado Supreme Court, because Colorado employees, or a portion thereof, in the involved federally recognized bargaining units failed, *inter alia*, to constitute themselves as a "collective bargaining unit" prior to that point at which the union security provisions were entered into.

union" referendum but also those employee groups which are eligible (1) to enter into "all-union agreements" and (2) to participate in "all-union" referenda. Thus, for example, the federally recognized bargaining units involved in this appeal may neither enter into an "all-union agreement" nor participate in an "all-union" referendum because the Colorado employees involved, or a portion thereof, have not constituted themselves as a "collective bargaining unit" in accordance with §8-3-104 (4). As to the CWA units herein, therefore, the "all union" referendum provisions in §8-3-108(1)(c) are an irrelevancy. Yet the reason for such irrelevancy is entirely unrelated to the nature of the union security provision at issue but, rather, stems from the failure of these federally recognized bargaining units to organize themselves into a "collective bargaining unit."

Furthermore, because a "collective bargaining unit" can only be composed of Colorado employees, multi-state federally recognized bargaining units are required, as to the negotiation of union security provisions, to fragment themselves and to undergo a secret ballot election totally unrelated to any ascertainable objective of §14(b). The "collective bargaining unit" requirement effectively emasculates the *federal* right of a federally recognized bargaining unit to negotiate a union security provision which can subsequently be validated pursuant to §8-3-108(1)(c). Therefore, a substantial question arises as to whether the exercise of the §7 right to negotiate a union security provision may be circumscribed in a manner such as that espoused by the Labor Peace Act. Similarly, the "collective bargaining unit" election requirement may well have a profoundly disruptive effect on aspects of collective bargaining unrelated to the negotiation of union security provisions.[25] This

[25]Thus, it is possible that a federally recognized bargaining unit, or that portion of it subject to the Labor Peace Act, would lose the "collec-

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Court has, under different facts, struck down portions of state statutes impermissibly infringing upon §7 rights. *Hill v. Watson*, 325 U.S. 538, 541-43 (1945); *United Auto. Workers v. O'Brien*, 239 U.S. 454, 458-59 (1950); *Nash v. Florida Ind. Comm'n*, 389 U.S. 235, 238-39 (1967).

It is, further, beyond peradventure that the NLRB is possessed of exclusive jurisdiction under §9 of the federal Act to determine representational questions and that states may not infringe upon such jurisdiction. *Bethlehem Steel Co. v. New York Labor Bd.*, 330 U.S. 767, 775-76 (1947); *LaCrosse Tel. Co. v. Wisconsin Emp. Rel. Bd.*, *supra* at 25-26. The Colorado Supreme Court's decision herein holds that NLRB certification of an appropriate unit is conclusive for all purposes except as to the appropriateness of a unit for negotiating "all-union agreements" and participating in "all-union" referenda. As to union security provisions, the Labor Peace Act, as construed by the Colorado Supreme Court, authorizes recertification of appropriate unit status within the strictures of §§8-3-104(4) and 107. In *Bethlehem Steel Co. v. New York Labor Bd.*, *supra*, the Court noted:

> "Comparison of the State and Federal statutes will show that both governments had laid hold of the same relationship for regulation, and it involved the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying

tive bargaining unit" election with a concomitant, adverse effect on a labor organization's bargaining posture. Moreover, because of the peculiar nature of representation elections under §8-3-107, it is possible for only a portion of those employees of the federally recognized bargaining unit within the State of Colorado to seek "collective bargaining unit" status. The effect of multi-"collective bargaining unit" elections, some of which may be won and others of which may be lost, on the bargaining position of a labor organization can only be conducive of chaos and possible disruption of commerce.

> this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might have come out with conflicting ones as they have in the past.... But the power to decide a matter can hardly be made dependent on the way it is decided...."

As further noted in *LaCrosse Tel. Co., supra* at 26, "[t]he problem of employee representation is a sensitive and delicate one in industrial relations...."

CWA recognizes full well that the requirement of "collective bargaining unit" status as a condition precedent either to entering into an "all-union agreement" or to participation in an "all-union" referendum differs somewhat from the New York Labor Board's and the Wisconsin Employment Relations Board's assertion of concurrent jurisdiction over all representational issues. But, the Colorado Supreme Court's decision herein does permit the Colorado Division of Labor to assume jurisdiction over the quintessentially representational issue of whether a group of employees, which may be all or only a portion of a federally recognized bargaining unit, desires to form itself into a "collective bargaining unit" for the purpose of entering into a union security provision. Such a requirement, fully supported by the language of the Labor Peace Act, bespeaks a legislative determination by the State of Colorado that federally recognized bargaining units are to be viewed as appropriate for collective bargaining *except as to union security matters*. It thus appears that, to a more limited extent, the duality of state and federal control over representational

matters eschewed in *Bethlehem Steel* and *LaCrosse* exists under the Labor Peace Act. Consequently, a substantial federal question is raised as to whether §14(b) affirmatively authorizes such duality of administration.

Finally, all of the above raises the question of whether §14(b) permits any kind of "regulation" *vis-a-vis* union security provisions other than the enforcing of state statutory or constitutional provisions absolutely proscribing a particular form of union security. *Schermerhorn* II and *Algoma Plywood & Veneer Co. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 301 (1949), indicate with clarity that a state may enforce such a provision; however, neither of these decisions nor any other of this Court has definitively determined whether §14(b) authorizes the kind of regulatory scheme espoused in the Labor Peace Act. In reliance upon *Schermerhorn* II and *Algoma*, the Colorado Supreme Court held that the Labor Peace Act was a form of a "more restrictive" policy concerning union security provisions affirmatively authorized under §14(b). [App. B at 26] In contrast, the NLRB has, in several decisions, held that §14(b) anticipated only absolute prohibition of specified kinds of union security provisions. *Northland Greyhound Lines, Inc.*, 80 NLRB 288 (1948) [employees in state which regulates union security provisions are part of appropriate unit for purposes of union shop authorization election but employees in states which prohibit union security provisions must be excluded from voting in such union shop authorization election]; *Western Electric Co.*, 84 NLRB 1019 (1949) [employees in states which regulate union security provisions are part of appropriate unit for purposes of union shop authorization election but employees in states which prohibit union security provisions must be excluded from voting in such union shop authorization election]; *Safeway Stores, Inc.*, 81 NLRB 387 (1949) [union shop agreement ratified under federal union shop auth-

orization election valid even though not meeting Colorado Labor Peace Act requirements]; *Cyclone Sales, Inc.*, 115 NLRB 431 (1956) [union security agreement invalidated by Colorado "all-union" referendum does not vitiate collective bargaining agreement so as to remove contract bar arising under federal law]; *Molders Union (Malleable Iron Range Co.)*, 150 NLRB 913 (1965) [no unfair labor practice when employee discharged pursuant to union security provisions unlawful under state statute which regulates union security provisions but does not absolutely prohibit such provisions] The Court has never addressed this issue except, as mentioned above, in the context of a state's right to afford affirmative relief to any employee discharged, or threatened with discharge, pursuant to a union security provision invalid under state law. The Colorado Supreme Court's decision directly raises the issue of whether §14(b) permits states to prohibit the application of union security provisions unlawful under a regulatory scheme which does not absolutely proscribe such provisions.

CONCLUSION

CWA respectfully requests the Court to note probable jurisdiction over this appeal and the issues presented herein and to order plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed three true and correct copies of the foregoing Jurisdictional Statement and the attendant Appendix by depositing same in the United States Mail, first class postage prepaid, this ____ day of September, 1976, addressed as follows:

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76-4594

In the

Supreme Court of the United States

OCTOBER TERM, 1976

COMMUNICATIONS WORKERS OF AMERICA, an unincorporated labor association,
Appellant,
v.
WESTERN ELECTRIC COMPANY, INCORPORATED, a New York corporation, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado, ALBERT F. MANGAN, in his capacity as a member of the Industrial Commission of the State of Colorado, and KENNETH C. RUSSELL, in his capacity as a member of the Industrial Commission of the State of Colorado, and THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado corporation,
Appellees.

APPENDIX TO JURISDICTIONAL STATEMENT
APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

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APPENDIX A

IN THE DISTRICT COURT IN AND FOR THE
CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action Nos. C-18-238 and C-18239 (Consolidated)

Courtroom No. 1

COMMUNICATIONS WORKERS OF AMERICA, (an unincorporated labor association), Plaintiff, vs. WESTERN ELECTRIC COMPANY, INCORPORATED (a New York corporation); STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR; JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor; INDUSTRIAL COMMISSION OF THE STATE OF COLORADO; HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado; ALBERT F. MANGAN, in his capacity as a member of the Industrial Commission of the State of Colorado; and KENNETH C. RUSSELL, in his capacity as a member of	) FINDINGS OF FACT AND CONCLUSIONS OF LAW

the Industrial Commission of Colorado; and)
THE MOUNTAIN STATES TELEPHONE)
AND TELEGRAPH COMPANY (a Colorado)
corporation),)
Defendants.)

THIS MATTER is before the Court pursuant to a record of evidence stipulated by the parties. On that basis, on the basis of briefs submitted by certain of the parties and on the basis of counsel's arguments and comments to Court, this Court makes the following findings of fact and conclusions of law in accordance with Colorado Rule of Civil Procedure 52(a).

FINDINGS OF FACT

1. The plaintiff, Communications Workers of America (hereafter CWA), is an unincorporated labor organization which has its international headquarters in Washington, D.C., and its principal Colorado place of business in Denver. At all times relevant hereto, and under 1968 and 1971 collective bargaining agreements, it lawfully was and is entitled to represent as exclusive bargaining agent certain employees of the industrial field forces of the Service Division of Western Electric Company, Incorporated (hereafter Western Electric), in the several states of the United States of America, including the State of Colorado. Similarly, as exclusive bargaining agent, CWA also lawfully was and is entitled to represent certain employees in the Plant and Traffic Departments of defendants The Mountain States Telephone and Telegraph Company (hereafter Mountain Bell).

2. Defendant Western Electric, is a New York corporation, duly authorized to do and is doing business in the State

of Colorado and manufactures, supplies and furnishes services and materials to Bell System associated companies, including Defendant Mountain Bell, in the several states of the United States of America.

3. Defendant Mountain States Telephone and Telegraph Company is a Colorado corporation duly authorized to do and is doing business is the states of Arizona, Colorado, Idaho, New Mexico, Montana, Utah, Wyoming and El Paso County, Texas, under the trade name Mountain Bell.

4. Defendant James M. Shaffer is the lawfully designated and selected executive director of the Department of Labor and Employment, Division of Labor, for the State of Colorado, and, as such, has the responsibility to enforce the provisions of the Colorado Labor Peace Act, C.R.S. §80-4-1, *et seq.*, (1963 as amended).

5. Defendants State of Colorado, Department of Labor and Employment, Division of Labor; Industrial Commission of the State of Colorado; and members Kimbrough, Mangan and Russell, and their successors, in their capacities as members of the Industrial Commission of the State of Colorado are vested with certain authority in accordance with C.R.S. §80-4-1, *et seq.*, (1963 as amended).

6. Defendant Western Electric made and entered into a written contract sometimes referred to as a collective bargaining agreement, denominated as Contract CWA-12 with plaintiff on or about May 1, 1968, which contract amended and extended a contract between the parties denominated as Contract CWA-11, covering certain communication equipment workers of the installation field forces of the Service Division of said defendant, which contractual arrangements have, at

all times relevant and material herein until July, 1971, been in full force and effect. Article 24 of said contract CWA-12 reads, in pertinent part, as follows:

ARTICLE 24

Maintenance of Union Dues

1. Each Employee who is a member of the Union:

(a) on or after the 30th calendar day following the beginning of his employment, or

(b) on or after the effect date of this contract whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this contract, except that each such Employee may, within the ten (10) day period immediately preceding the termination date of this contract, terminate his obligations to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company of his withdrawal from membership in the Union.

1.1 Said condition of emplayment shall reapply to any such Employee after his return to the bargaining unit following any period of formal separation* therefrom, provided such Employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

*Includes:
Transfers out of the bargaining unit.
Removal from the payroll of the Company.
Leaves of Absence of more than one (1) month duration.

2. The provision of this Article 24 shall not be effective if inconsistent with the law of the applicable State.

3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this Aritcle 24.

7. Because job clerks also are employed in the installation field forces of the Service Division of said Defendant, Western Electric made and entered into a written contract sometimes referred to as a collective bargaining agreement with plaintiff covering said employees and denominated as Contract CWA-JC-12 on or about May 1 ,1968, which contract amended and extended a contract denominated as Contract CWA-JC-11 between said parties, and which contractual agreements have at all times relevant and material herein until July, 1971, been in full force and effect. Article 23 of said Contract CWA-JC-12 reads in pertinent part as follows:

ARTICLE 23

Maintenance of Union Dues

1. Each Employee who is a member of the Union:

(a) on or after the 30th calendar day following the beginning of his employment, or

(b) on or after the effective date of this contract, whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this contract, except that each such Employee may, within the 10 day period immediately preceding the termination date of this contract terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying

both the Union and the Company of his withdrawal from membership in the Union.

1.1 Said condition of employment shall reapply to any such Employee after his return to the bargaining unit following any period of formal separation* therefrom, provided such Employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

*Includes:
Transfers out of the bargaining unit.
Removal from the payroll of the Company.
Leaves of Absence of more than one (1) month duration.

2. The provisions of this Article 23 shall not be effective if inconsistent with the law of the applicable State.

3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this Article 23.

8. Defendant Mountain Bell made and entered into a written contract sometimes referred to as a collective bargaining agreement, on or about May 9, 1968, with the plaintiff, covering certain employees in the Plant Department of said defendant, which Agreement reads in pertinent part as follows:

"2.1 The Company and the Union agree that they will not interefere with the rights of employees to join or refrain from joining the Union and agree that they will not in any manner, because of an employee's membership

or nonmembership therein directly or indirectly discriminate against, interfere with, coerce, restrain, discharge, demote, transfer, or discipline any employee.

. . . .

"14.1 Each employee who is a member of the Union on or after the 30th calendar day following the beginning of his employment, or on or after the effective date of this Agreement, whichever is the later, shall as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the termination of this Agreement, except that each such employee may, within the 10-day period immediately preceding May 9, 1971, upon which date the Agreement terminates, terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company in writing of his withdrawal from membership in the Union.

"14.2 Said condition of employment shall reapply to any such employee after his return to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

"14.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such State.

"14.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article."

9. The defendant, Mountain Bell, made and entered into a written contract sometimes referred to as collective bargaining agreement, on or about May 9, 1968, with the plaintiff, covering certain employees in the Traffic Department of the defendant, which Agreement reads in pertinent part as follows:

> "1.1 The Company, its officers and supervisors, shall not interfere with the rights of employees to become and remain members of the Union and shall not in any manner, directly or indirectly, discriminate against, interfere with, coerce, restrain, discharge, demote, transfer or discipline any employee by reason of his or her membership or non-membership in the Union.
>
> . . . .
>
> "Article 15
>
> "Section 1: Maintenance of Dues
>
> "1.1 Each employee who is a member of the Union on or after the 30th calendar day following the beginning of her employment, or on or after the effective date of this Agreement, whichever is the later, shall as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the termination of this Agreement, except that each such employee may, within the 10 day period, immediately preceding May 9, 1971, upon which date the Agreement terminates, terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company in writing of her withdrawal from membership in the Union.

> "1.2 Said condition of employment shall reapply to any such employee after her return to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any Leave of Absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following her return to the bargaining unit.
>
> "1.3 The provisions of this Article shall not apply to any employee in any State in which the application of such provision would be inconsistent with the law of such State.
>
> "1.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article."

12. During the term of Mountain Bell's two collective bargaining agreements with CWA, numerous employees of the defendant in the State of Colorado and within the bargaining units covered by the provisions of the foregoing collective bargaining agreements were members of the plaintiff on or after the thirtieth calendar day following the beginning of their employment or on or after the effective date of said collective bargaining agreements and thereafter ceased paying or tendering to the union an amount equal to their periodic union dues. In each case where said individuals ceased payments of their periodic union dues, they did not cease payment within the ten day period immediately preceding the termination date of the applicable collective bargaining agreement, the "escape" period under said contracts. On or about June 3, 1970, and again on or about September 3, 1970, plaintiff demanded that Mountain Bell dismiss the employees who had so ceased paying or tendering to the union an amount equal to their periodic union dues and who, it was alleged, were in

violation of said contract provisions set out above in paragraphs 8 and 9. Defendant Mountain Bell refused to dismiss such employees contending that the above-cited provisions were of no effect in light of the provisions of the Colorado Labor Peace Act, C.R.S. §80-4-1 *et seq.* (1963, as amended).

11. During the term of Western Electric's contracts with plaintiff, CWA-12 and CWA-JC-12, numerous employees in the State of Colorado of defendant Western Electric in the appropriate bargaining unit covered by said contracts were members of plaintiff on or after the thirtieth calendar day following the beginning of their employment or on or after the effective date of the applicable collective bargaining agreement and ceased paying or tendering to the union an amount equal to their periodic union dues. In each case such cessation did not occur within the ten day period immediately preceding the termination date of the applicable collective bargaining agreement, the "escape" period under said contracts.

12. On or about June 5, 1970, P. J. Morgan, National Director of Plaintiff and its authorized agent in dealing with defendant Western Electric, addressed letters to Robert W. Benson, Labor Relations Manager and authorized agent of said defendant under the 1968 contracts referred to above demanding that said defendant take such action as is required under the aforesaid Articles 23 and 24, including termination of employment of said employees.

13. On or about June 16, 1970, the said Robert W. Benson, on behalf of the said defendant, replied by letter to National Director Morgan's letter of June 5, 1970, stating that, "Certain provisions of the laws of the State of Colorado prohibit an employer from entering into an agreement with representatives of its employees which provides for union security

unless the Industrial Commission of Colorado certifies that three-quarters or more of the bargaining unit employees voting in a referendum shall have voted affirmatively in favor of such an agreement." In said letter the said Robert W. Benson went on to describe the said defendant's position that,

". . .

> since no such referendum has been conducted among the bargaining unit employees based in Colorado, it would violate Colorado law to condition the employment of these employees upon the payment of union dues. Accordingly, we must deny your request that the Company terminate the above-named employees because of their alleged failure to pay dues to the Union because the contract articles have no effect in light of the provisions of the Colorado Labor Peace Act, C.R.S. 80-4-1 (1963), et seq., as amended.

Defendant Western Electric therefore refused to dismiss said employees.

14. An "all-union" referendum election pursuant to C.R.S. 80-4-1(1) (d) (1963) has not been held with respect to any of the aforesaid contracts.

15. No extant material or notes concerning the bargaining history and practices surrounding the applicable provisions of any of the aforesaid collective bargaining agreements exist to aid the court in interpreting their intent and the aforesaid contract Articles are the only evidence before this court concerning bargaining history.

16. In July, 1971, defendant Western Electric entered

into a written collective bargaining agreement effective August 14, 1971, after expiration of the "escape period" and ratification and approval by the members and President of plaintiff, denominated as contract CWA-13 and covering certain communication equipment workers of the installation field forces of the said Service Division of said defendant, which contractual arrangements have, at all times relevant and material herein from said date, been in full force and effect. Article 24 of said Contract CWA-13 reads in pertinent part as follows:

ARTICLE 24

Union Security

1. Each Employee who is a member of the Union on the date of ratification or approval of this Contract by the President of the Communications Workers of America, whichever is later, or who later becomes a member of the Union and all Employees hired on or after such date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of Employees hired on or after such date of ratification or approval thirty (30) days after hire, whichever of these dates is later until the termination of this Contract, except that an Employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his or her withdrawal from membership in the Union, by registered mail, return receipt requested, and postmarked with the ten (10) day calendar period immediately preceding 11:59 P.M. July 27, 1971.

2. The condition of emplayment specified in Paragraph 1 shall not apply during the periods of formal separation* from the bargaining unit by any such Employee but shall reapply to such Employee on the thirtieth (30th) day following his or her return to the bargaining unit.

*The term "formal separation" includes transfers out of the bargaining unit, removal from the payroll of the Company, and Leaves of Absence of more than one (1) month duration.

3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this article.

4. This article shall apply only in those States and the District of Columbia where the law permits the Union to enter into this type of union security agreement. If during the term of this Contract the Union shall become duly authorized under the laws of any other State to enter into this type of union security agreement, the effective date of this article as to Employees in such State shall be the date upon which the Company receives proper written evidence from the Union that it is fully qualified to enter into such an agreement in such State.

17. In July, 1971, defendant Western Electric entered into a written collective bargaining agreement, effective on August 14, 1971, after expiration of the "escape period" and ratification and approval by the members and President of plaintiff, denominated as Contract CWA-JC-13 and covering job clerks employed in the installation field forces of the said Service Division of said defendant, which contractual arrangements have, at all times relevant and material herein from

said date, been in full force and effect. Article 23 of said Contract CWA-JC-13 reads in pertinent part as follows:

ARTICLE 23

Union Security

1. Each Employee who is a member of the Union on the date of ratification or approval of this Contract by the President of the Communications Workers of America, whichever is later, or who later becomes a member of the Union and all Employees hired on or after such date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of Employees hired on or after such date of ratification or approval, thirty (30) days after hire, whichever of these dates is later until the termination of this Contract, except that an Employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his or her withdrawal from membership in the Union, by registered mail, return receipt requested, and postmarked within the ten (10) day calendar period immediately preceding 11:59 P.M., July 27, 1971.

2. The condition of employment specified in Paragraph 1 shall not apply during periods of formal separation* from the bargaining unit by any such Employee but shall reapply to such Employee on the thirtieth (30th) day following his or her return to the bargaining unit.

*The term "formal separation" includes, transfers out of the bargaining unit, removal from the payroll of

the Company, and Leaves of Absence of more than one (1) month duration.

3. The company may inform Employees and applicants for employment of their rights and obligations under the provisions of this article.

4. This article shall apply only in those States and the District of Columbia where the law permits the Union to enter into this type of union security agreement. If during the term of this Contract the Union shall become duly authorized under the laws of any other State to enter into this type of union security agreement, the effective date of this article as to Employees in such State shall be the date upon which the Company receives proper written evidence from the Union that it is fully qualified to enter into such an agreement in such State.

18. On or about the 18th day of July, 1971, Mountain Bell entered into a written collective bargaining agreement, with CWA, as representative of certain employees in the Plant and Traffic Departments of the company, which agreement reads in pertinent part as follows:

"2.1 The Company and the Union agree that they will not interfere with the rights of employees to join or refrain from joining the Union and agree that they will not in any manner, because of an employee's membership therein directly or indirectly discriminate against, interfere with, coerce, restrain, discharge, demote, transfer, or discipline any employee.

. . . .

"Article 21

"Modified Agency Shop

"21.1 Each regular employee who is a member of the Union on the date of ratification or approval of this agreement by the President of the Union, whichever is later, or who later becomes a member of the Union and all regular employees hired on or after that date shall as a condition of emplyoment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of regular employees hired on or after such date of ratification or approval, 30 days after hire, whichever of these dates is later until the termination of this contract, except that an employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his withdrawal from membership in the Union by registered mail, return receipt requested, and post-marked within the ten-day calendar period immediately preceding 11:59 P.M., July 28, 1971.

"21.2 Said condition of employment shall reapply to any such employee after returning to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following return to the bargaining unit.

"21.3 The provisions of this Article shall not apply to any employee in any state in which the application of such

provision would be inconsistent with the law of such State.

"21.4 The Company may inform employess and applicants for employment of their rights and obligations under the provisions of this Article."

19. An "all-union" referendum election pursuant to C.R.S §80-4-6 (1) (d) (1963 as amended) has not been held with respect to the aforesaid 1971 collective bargaining agreements.

20. A controversy has arisen between plaintiff and defendants concerning the scope of applicability of the alleged prohibitory and/or regulatory provisions of the Colorado Labor Peace Act C.R.S. §§80-4-1 *et seq.* (1963, as amended), and the effect of such statutory scheme upon the construction of each and all of the aforesaid contractual provisions as between the plaintiff and defendants Western Electric and Mountain Bell.

21. Entry of a decree declaring plaintiff's and defendants' rights, status and legal relations under the aforementioned provisions of said written contracts will terminate the controversies presented between the plaintiff and said defendants herein.

22. The relief sought by the plaintiff and the defendants herein is provided for by C.R.S. §§77-11-1 *et seq.* (1963, as amended) and Colorado Rule of Civil Procedure 57. and all of the defendants herein are parties who have or claim any interests which will be affected by the within requested declaratory judgment.

23. This controversy was submitted to the court by stip-

ulation upon an agreed statement of facts as contemplated by Colorado Rule of Civil Procedure 57(d), supported by the required affidavits. The controversy thus presented is real and filed in good faith by all parties hereto to determine the rights of the said parties.

CONCLUSIONS OF LAW

1. A justiciable controversy exists between plaintiff and the defendant Western Electric concerning the enforcement and application of Article 24 of CWA-12, Article 23 of CWA-JC-12, Article 24 of CWA-13 and Article 23 of CWA-JC-13, and between plaintiff and defendant Mountain Bell concerning the enforcement and application of each of those clauses referred to above in contracts between CWA and Mountain Bell, in the State of Colorado in the absence of an "all-union referendum" conducted by the Industrial Commission of the State of Colorado pursuant to the Colorado Labor Peace Act, C.R.S. §§80-4-1 *et seq.* (1963, as amended).

2. Declaratory relief pursuant to C.R.S. §§77-11-1 *et seq.* (1963) and Colorado Rule of Civil Procedure 57 is appropriate and may be granted since all defendants herein are parties who have or may claim an interest herein which may be affected by the within relief.

3. This court has jurisdiction over the subject matter of this action and jurisdiction over the parties.

4. In 1935, Congress passed the National Labor Relations Act, 29 U.S.C. §151 *et seq.* (1964), and thereby undertook to regulate generally conduct by unions and employers in the field of labor management relations. Section 7 of that Act defined the rights of all employees to engage in or refrain from union activity,

> "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(3) provided that it was unfair labor practice for an employer to discriminate in any term, condition or tenure of employment because of union activity except,

> "that nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . .

5. Section 8(3) did not result in congressional preemption of *any* state regulation of any union security clause or device, such as those in issue before this Court. According to the United States Supreme Court "Section 8(3) merely disclaim[ed] a national policy hostile to the closed shop or other forms of union-security agreement." *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307 (1949), and allowed the states "to pursue their 'own more restrictive policies'," *id.* at 314,, over union security devises. That conclusion by the United States Supreme Court was drawn from the legislative history of the Wagner Act of 1935, prior to the Taft-Hartley amendments of 1947.

6. In 1947, Congress added the Taft-Hartley amendments to the National Labor Relations Act, which restricted severely the scope of permissible union security clauses penalizing employees for non-union membership by outlawing the closed shop entirely. Permissible employment discrimination under union security clauses was limited to "failure of the employee to tender the periodic dues and the initiation fees uni-

formly required as a condition of acquiring or maintaining membership [in the union]." 29 U.S.C. §158(a) (3) (b) (1964). Furthermore, by federal law, an employee had to be given thirty days prior to the time that his "membership" obligation under any union security clause could be enforced against him. The Taft-Hartley amendments also added Section 14(b), popularly known as the "right-to-work" provision, which specifically authorized state regulation of a union security:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law." 29 U.S.C. §164(b) (1964)

The Supreme Court determined and this court is bound by the finding that Section 14(b) "was included [solely] to forestall the inference that federal policy was to exclusive. . ." in the matter of union security. *W.E.R.B. v. Algoma Plywood & Veneer Co., supra,* 336 U.S. at 314. Thus, it was added, not to add other union security devices to the list of those a state could regulate, but to emphasize what was intended originally in the Wagner Act of 1935 – that a state could regulate or prohibit any union security device it desired. Federal labor policy has remained unchanged in that area since 1935. As the *Algoma* court has concluded, even in the absence of Section 14(b), and as confirmed by its view of the legislative history of the Wagner Act neither §8(3) nor any other provision of the National Labor Relations Act resulted in congressional preemption of state regulation of union security clauses or devices, including the union shop, agency shop, modified union shop, modified agency shop, discriminatory hiring halls, maintenance of dues, maintenance of membership and the like, such as each of those clauses in issue before this Court. *Accord, Motorcoach Employees v. Lockridge,* 403 U.S. 274, 297 (1971).

7. *N.L.R.B. v. General Motors,* 373 U.S. 734 (1963) merely defined that under the Wagner Act and Taft-Hartley amendments, states could regulate any security device compelling any employee to pay money to a labor union and *Retail Clerks, Local 125 v. Schermerhorn* 375 U.S. 96 (1963), made clear that the individual state's power began with "execution and application" of an offending union security agreement. What state law reaches and prohibits or regulates within the outer perimeters set by federal law must be decided by state courts. *N.L.R.B. v. General Motors, supra.*

8. Neither the National Labor Relations Act, the Taft-Hartley amendments, nor any other federal legislation has operated to preempt the provisions of the Colorado Labor Peace Act regulating union security clauses as "all-union" agreements requiring an "all-union" referenrum as a prerequisite to their validity. Union security agreements requiring "membership" in a labor organization, regulation of which is preserved to the states explicitly by Section 14(b) of the Taft-Hartley Act and implicitly by the Wagner Act, are the same agreements conditioning "membership" on the payment of uniform dues and initiation fees described by Section 8(a) (3) of the National Labor Relations Act. *Retail Clerks v. Schermerhorn, supra.* The State of Colorado retains jurisdiction to prohibit or regulate all such union security clauses beginning with their "actual negotiation and execution." *Id.* The Colorado Supreme Court in *United Mine Workers v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956), also concluded that resolution of the question of the union security

had always been left totally to the states, including the State of Colorado, and that the State of Colorado had chosen to regulate union security through the vehicle of the Colorado Labor Peace Act.

9. Using the Wagner Act as its example, Wisconsin enacted an Employment Peace Act in 1935, and Colorado's Labor Peace "was patterned on, and followed closely. . ." that act. *Denver Milk Producers v. Teamsters,* 116 Colo. 389, 183 P.2d 529,547 (1947). As *American Federation of Labor v. Reilly,* 113 Colo. 90, 155 P.2d 145 (1944) made clear, Wisconsin decisions under that act are highly persuasive and to be followed by Colorado Courts in construing the Labor Peace Act. The Colorado General Assembly presumably was aware of the extant federal legislative history and congressional viewpoint and preference when it followed Wisconsin's lead in 1943 and began to regulate union security by enacting the Colorado Labor Peace Act. Presumably and evidently, that General Assembly exercised its power over labor-management relations to the fullest possible extent and did *not* begin from the mistaken premises, either that the N.L.R.B. had exclusive jurisdiction over labor relations or that Congress had preempted the power of the State of Colorado to regulate and control union security. Since congressional labor policy sanctioning state control of all union security devices has never changed, nothing further can be inferred from the date of passage. This court cannot conclude that the Colorado legislature intended to restrict the purview of state influence to only the union shop nor condone the view that it intended to abandon the rights of workers in this state guaranteed in §80-4-4 of the Labor Peace Act just because §14(b) of the Taft-Hartley Act was not yet on the books, especially since there is no extant legislative history of the Labor Peace Act.

This court draws comfort from the fact that the U.S. Supreme Court reached the same conclusion in 1949 when it reviewed the Wisconsin statute under both the original Wagner Act and under §14(b) of the Taft-Hartley amendments. It concluded as had the Wisconsin Employment Relations Board and Wisconsin state courts that §14(b) changed nothing and that the states had always been free to regulate any form of union security under the Wagner Act. *W.E.R.B. v. Algoma Plywood & Veneer Co., supra.* That court considered the form of union security or the name the parties gave it irrelavant to determining the scope of state power, and since that date it has declined consistently to use the preemption doctrine to withdraw from consideration any specific devices compelling membership in a labor union. *E.g., Motorcoach Employees v. Lockridge,* 403 U.S. 274 (1971). Accordingly, this court chooses to follow the rationale of the foregoing decisions and holds that in conformity with the original Wagner Act, as clarified by §14(b), Colorado is free to regulate as an "all-union" agreement any union security clause contained an any collective bargaining agreement as long as the clause contains any mandate which compels an employee's financial support or allegiance to the labor organization regardless of name, including, but not limited to, the union shop, agency shop, modified union shop, modified agency shop, discriminatory hiring halls, maintenance of dues, maintenance of membership and the like. *Compare Radio Officers' Union, C.T.U. v. N.L.R.B.,* 347 U.S. 17 (1954), *with N.L.R.B. General Motors,* 373 U.S. 743 (1963). As in Wisconsin, the true reason is not the Colorado Labor Peace Act's fundamental purpose, declared in C.R.S. §80-4-4 (1963), is to protect the rights of *each* employee to engage in or refrain from activities in support of *any* labor organization unless and until three-quarters of the employees affected in a craft or establishment vote by a secret ballot to require membership in a labor organization as a con-

dition of employment in an all-union referendum. *See* C.R.S. 80-4-6 (1963). Those rights cannot be fully protected unless the Labor Peace Act is construed broadly in that manner.

10. The provisions of the Colorado Labor Peace Act, C.R.S. §80-4-1 *et seq.* (1963, as amended) apply to union security clauses in collective bargaining agreements negotiated by multi-state employers engaged in interstate commerce and doing business within the state of Colorado and to national labor organizations whenever the collective bargaining agreement in issue is applicable to a local union operating or headquartered within the State of Colorado. *Allen-Bradley Local No.* 1111 *v. W.E.R.B.*, 315 U.S. 740 (1942). The Colorado Supreme Court reached the same conclusion in *American Federation of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1945). To rule otherwise in this case would invalidate *sub silentio* the congressional intent implicit in the Wagner Act and Section 14(b) of the National Labor Relations Act and render impotent the power of the State of Colorado validly exercised in the Colorado Labor Peace Act to regulate union security and to preserve the rights of employees within the boundaries of the State of Colorado. No such conclusion was intended by the drafters of the Wagner Act, and therefore, this court concludes that the Colorado Labor Peace Act is applicable to collective bargaining agreements, including those in issue here, executed between employers and labor organizations subject to the National Labor Relations Act in all areas, including union security, reserved specifically to the states by the National Labor Relations Act.

To construe the Colorado Labor Peace Act generally in-any other manner would sanction a niggardly view inconsistent with the liberal construction of the Act mandated by the legislature in C.R.S. §135-1-212 (1973 Supp.) and incompatible

with full enforcement of the objectives the Act and the clear legislative purpose of preservation of worker rights as noted above. C.R.S. §135-1-203(1)(a), (g). Likewise, construing the Act very narrowly to exclude all but union shop clauses applicable to intrastate employers would render the Act essentially a nullity, an effect at variance with the legislative directive to this court to reach "a just and reasonable result". C.R.S. §135-1-201(c).

11. Since federal law defines nothing more than the outer-most perimeter of state regulation – that no one may discriminate in terms of employment by use of any union security device which requires an employee to do more than tender to the union those dues and initiation fees uniformly required of all other employees as a condition of obtaining employment, beginning thirty days after employment – this court now must look to the exact provisions of the Labor Peace Act, viewed liberally, C.R.S. §135-1-212, with an eye to fulfilling its lawful objects and legislatively declared purposes. C.R.S. §135-1-2-3(1)(a),(g). To properly complete that task requires this court not only to consider the plain meaning of the statute, C.R.S. §135-1-101, but also the true meaning of those "words and phrases that have acquired a technical or particular meaning . . . ." *Id.*

12. The Colorado Labor Peace Act's fundamental purpose is to protect the right of each employee to determine for himself whether or not to engage in labor matters or associate himself with a labor organization. The most crucial section of the law is C.R.S. §80-4-4 which guarantees those rights, declares them "essential" and adopts a policy of *strict construction* of all other provisions of the Act when possibly applied in derogation of those basic rights. It states:

"80-4-4. Rights of Employees. – In accordance with the provisions of this article, employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own free choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Such employees and each of them shall also have the right to refrain from any or all of such activities. Such rights of employees and each and all of them are essential rights and nothing hereinafter contained shall be so construed as to infringe upon or have any operation as against or in conflict with such rights and each and all of them."

The Act is replete with specific policy declarations by the legislature in favor of those rights as found in C.R.S. §80-4-4 and specific provisions designed to implement and protect them. Section 80-4-1 contains a declaration of policy for labor relations in Colorado and recognizes in subsection (2) thereof the interests of the public, the employee and the employer. It continues in subsection (3),

> "[t]hat whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, *they should not be permitted, in the conduct of their controversy, to intrude directly or indirectly into the primary rights of third parties to earn a livelihood. . . by any lawful means and free from molestation, interference, intimidation, restraint or coercion.*

Subsection (4) requires that the terms and conditions of work result from "voluntary agreement between employer and employee." That does not mean a union rather than an employee because the same subsection states that each employee "has

the right, if he desires, to associate with others [for collective bargaining purposes] without intimidation or coercion from any source." Subsection (5) recognizes the essential right of secret vote by the worker and that each employee "should have the right to *elect officers by secret ballot and to determine and vote* upon the question of striking or not striking or *other questions of policy* affecting the entire membership."

Section 80-4-2(7)(e) declares, in an unusual provision, that the discharge of an employee constitutes a labor dispute *"when such discharge or refusal to employ is founded upon membership in a union or labor organization. . . . "* Furthermore,C.R.S. §80-4-16(2) prohibits Colorado courts from issuing an injunction restraining a person from "ceasing. . . to perform any work or to remain in any relation of employment," or "becoming or remaining a member of any labor organization or of any employer organization. . ." C.R.S. §80-4-16(3). Section 80-4-17 likewise is crucial, for the legislature chose to *restate* and *reiterate* the policy declarations of C.R.S. §80-4-1, *supra*. That section points out that every undertaking or promise of any kind or type between an employee and an employer whereby he agrees to join or remain a member of either, *"are hereby declared to be contrary to public policy* and shall not afford any basis for the granting of legal or equitable relief of any court against a person or party to such undertaking or promise." Each of those rights is spelled out specifically in C.R.S. §80-4-17(b), (c) and (d).

Any violation of employee rights as delineated above is declared by C.R.S. §80-4-6(2)(b) to be an unfair labor practice. That provision clearly refers not only to the right to join or not to join a labor organization, but each individual employee's right to vote on all matters affecting his membership in a labor organization.

Colorado has chosen the strongest possible language to protect the individual employee's rights, and this Court must, by legislative mandate, consider this controversy against that policy backdrop. Adding and categorizing each such right individually and repetitively and prohibiting *specifically* not only employer and union, but also any public action, designed to infringe upon those "essential rights" of C.R.S. §80-4-4 establishes that every employee in Colorado has at least the same rights as do employees in "right-to-work" states to engage in or refrain from union activity, and each employee must be accorded the same basic opportunity to determine the type of organization, if any, he wishes to join. Thus, while a bargaining agent may be certified as "exclusive" under federal law, that does not mean an employee loses his freedom to join that union, another union or no union. That right is guaranteed each worker, not just some, and not just those who have worked for one employer a long time. The fact that those statutory provisions are even somewhat redundant demonstrates the extreme concern of the Colorado General Assembly to ensure that each employee is given every option and complete freedom of choice in labor matters.

13. Colorado does provide one exception. If three-quarters of all the employees in a bargaining unit want a union security clause that requires them and others to become or remain members of one that specific union, or pay a sum equivalent in dues to that specific union, such a clause may be legalized by an affirmative vote of three-quarters of their number and formalized between the union and employer in an "all-union agreement."

An all-union agreement is defined as

an agreement between an employer and a collective bar-

gaining unit representing *some or all of his employees*, whereby all of the employees of an employer in a craft or an establishment are required to be members of a single labor organization. C.R.S. §80-4-2(8) (1963).

Unquestionably, that language is somewhat ambiguous. By plain meaning the union need only represent "some" employees and, perforce, those employees are free to join another union until the existing union wins an "all-union" referendum. What employees must then become members of that union are those in the same "craft" or "establishment." A craft is composed of people who use similar skill and training to perform work of a similar character. *See Switchmen's Union of North America v. National Mediation Bd.*, 135 F.2d 785,793 (D.C. Cir. 1943). An establishment is any thing or entity which has become permanently founded. *See Webster's New World Dictionary*, p. 497 (1957 ed.) The latter, thus, is broader than merely a collective bargaining unit and includes not only the plant or factory, but also any certified, existing union to which employers may belong. Considering those meanings in light of legislative policy and existing federal law leads irresistably to the conclusion that each clause in issue is an "all-union" agreement because it compels employees of defendants to be members, i.e., pay dues, to one single labor organization and none other than plaintiff.

14. An "all-union" agreement may be executed between an employer and a union that represents only some of its employees. If the union represents only some of its employees, another union may represent other employees, and there may be two or more N.L.R.B. certified bargaining representatives for different groups of employees. Section 80-4-5(1), which deals with bargaining representatives and elections, states:

> A unit chosen for the purpose of collective bargaining shall be the exclusive representative of all of the employees in such unit, provided the majority of the employees of one employer, or the majority of the employees of one employer *in a craft,* vote at such election. . . .

Thus, our legislature has said that the collective bargaining representative need represent only a small segment of all the "employees." Also, in that provision it carefully excluded the word "establishment." Since there may be more than one union, each of which represents only a portion of the employees of an employer, and different recognizable groups of employees, it follows from that and from the definition of the word "establishment" that an all-union agreement covers not only certain segments of the employer's plant, but also any recognizable "craft" group of employees and the local unit of the labor organization.

Thus, an "all-union" agreement is any union security clause negotiated and executed between an employer and a local union which requires "all" the employees of that employer who are "members" of that local union, or included in a recognized and defined employee group, to become and remain members of that one certified union, rather than any other, and to maintain their membership in that union by contributing financial support in the form of dues payments. The Colorado Labor Peace Act covers every kind of union security device, as long as some employees are required to continue their "membership" and financial support of that labor organization regardless of their wishes. That conclusion also is mandated by C.R.S. §80-4-4, which guarantees every single Colorado employee freedom of choice and accords each worker's rights a status paramount to the interests of either labor, management, or the public. For this court to hold otherwise would be to

sanction perversion of legislative policy by allowing most workers' rights to be disregarded any time any one employee was excluded from any union security clause. That would be precisely what this court would have to do here. This court believes the Colorado legislature fully intended to guarantee all workers the right to join *and later quit* any labor organization until those workers themselves by secret ballot take that right away, and it will not subvert that right. That is the only reasonable and liberal construction possible which effectuates the Act's policy in C.R.S. §80-4-4 of guaranteeing freedom of choice. That conclusion also is consistent with the United States Supreme Court's affirmance of the Wisconsin Supreme Court's determination that a maintenance of membership clause applicable only to existing employees violated Wisconsin law when its statutory language was the same as Colorado's and in the absence of an "all-union" referendum. *W.E.R.B. v. Algoma Plywood & Veneer Co., supra.*

Furthermore, neither in Wisconsin nor in Colorado does the "all-union" agreement proviso change the philosophy of the act to guarantee employees' freedom of choice; rather it provides an additional manifestation of the right of free choice, for if employees desire a union security clause, their rights to engage in or refrain from union activity dictate that they should also have that right. The sole additional mandate set by the legislature arises because of its preference, expressed again and again, in favor of each employee's freedom from coercion of any kind, and its statement in C.R.S. §80-4-4 that employee rights are "essential." Approval of any union security device in derogation of those rights must be strictly construed and carefully scrutinized to ensure that it complies with the statute. *Id.* Otherwise, the mandate of employee freedom expressed in the Colorado Labor Peace Act would be frustrated.

15. A negotiated "all-union" agreement is invalid in the absence of the referendum specified in C.R.S. §80-4-6(1)(d), which declares it to be an unfair labor practice for an employer:

> . . . to encourage or discourage membership in any labor organization . . . by discrimination in regard to hiring [or] tenure . . .' except that an employer shall not be prohibited from entering into an all-union agreement with representatives of his employees, *in the collective bargaining unit, where three-quarters or more of his employees shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the Director.*

Without that secret vote of affected employees, which is also declared essential by C.R.S. §80-4-1, it is an unfair labor practice to encourage or discourage membership in any labor organization, C.R.S. §80-4-6(1)(c), and is specifically declared to be contrary to the public policy of Colorado by C.R.S. §80-4-17. Thus, until an election is held and such an "all-union" agreement is approved by three-quarters of the employees voting, *all* union security provisions of any kind, including the union shop, agency shop, maintenance of dues or membership, are illegal and void in Colorado and in contravention of the carefully protected rights of employees to chart their own course in labor matters in negotiations with their employer.

16. In the absence of an "all-union" referendum the Colorado Labor Peace Act prohibits entirely all union security devices and constitutes the legal equivalent of a right-to-work law, which also protects employees' right to engage in or refrain from collective activity. Judicial precedent from "right-to-work" states establishes that all union security devices in-

cluding union shop, agency shop, modified union shop, modified agency shop, discriminatory hiring hall, maintenance of dues, and maintenance of membership are illegal and prohibited in all circumstances if they compel in any manner an employee's financial support or allegiance to a labor organization. *Compare Local Union No. 438 v. Curry*, 371 U.S. 542 (1963); *and Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, *cert. denied*, 368 U.S. 829 (1961); *with Amalgamated Association of Street, Electric, Railway & Motorcoach Employees v. Las Vegas - Tonopah - Reno Stagecoach Line, Inc.*, 202 F. Sup. 726 (D. Nev. 1962), *aff'd*, 319 F.2d 783 (9th Cir.. 1963) and *Retail Clerks International Association v. Schermerhorn* 373 U.S. 746 (1963). In Colorado, however, union security is prohibited *until* the "all-union" referendum is had and won by the union; then and only then may an employee's "right-to-work" be controlled by union security clauses. Colorado thus has a modified right-to-work act and in the absence of the all-union referendum, precedent from right-to-work states is equally compelling here.

17. Although the Colorado Supreme Court has not squarely defined the reach of "all-union" agreements, its enunciation of policy underlying the Labor Peace Act support this court's view. It has emphasized and approved the legislature's declared public policy of protecting employer/employee rights and has declared illegal any and all union security agreements in the absence of the "all-union" referendum. In *Bowers v. Teamsters, No. 17, Civil Action No. B-7920,* (Dist. Ct. February 17, 1956) (McWilliams) the court was called upon to consider the validity of union picketing designed to induce an employer to sign an "all-union contract", requiring employees to become union members within thirty days or lose their jobs. The sole question before the court was whether the union by its acts and conduct had violated the Colorado Labor Peace

Act. Emphasizing the public policy embodied in C.R.S. §§80-4-1, -4-17, *supra*, the court stated that the union was attempting to do indirectly what it could not do directly by trying to require the employer to sign a contract containing the questioned clause before the employees had voted in a representational election for the union. The court found that the rights of the employees to join or refrain from joining a union had been ignored. The Court emphasized that the union had a viable, lawful manner in which to obtain the right to represent those employees by following the relevant provisions of the Colorado Labor Peace Act, and that attempting to obtain that "coercive right" by any other means was *prohibited* by the Labor Peace Act in Colorado. Its determination was based upon what is now C.R.S. §80-4-4, which protects and guarantees certain rights to employees, and §80-4-6(c)(e) which declares improper an all-union agreement unless the statutory election is had. In conclusion, the court found the picketing unlawful and issued an injunction.

In so ruling, the *Bowers* court relied upon *Meat Cutters v. Green*, 119 Colo. 92, 200 P.2d 924 (1948), in which the union had lost a representational election and then threatened to close the employer's business operation unless he entered into a contract requiring all his employees to become union members. Although the decision turned on whether there was "a labor dispute" involved, the Supreme Court indicated that had the employer consented to the union security clause demanded by the union, *the result would have meant that those of his employees who had expressly indicated their desire not to have union representation would have been forced to join the union or be discharged*. In crucial language, the court stated:

If, under the conditions here, Green had signed the contract, which the secretary and business agent of the union was insisting should be executed by him, he would have been guilty of a violation of section 6(1)(a), and Section 6(1)(c), and Section 6(1)(3), of the Labor Peace Act, and his action would have constituted an unfair "labor practice," for which he would have been amenable in civil and criminal actions. 119 Colo. at 105-06.

For Green to have entered into the agreement proposed without a referendum would have violated the Colorado Labor Peace Act because he would have prevented his employees from exercising their right of free choice to join a labor organization and committed an unfair labor practice. That case expressly recognizes that an "all-union" referendum, won by the union is a condition precedent to execution or enforcement of any union security agreement. Without it, any union security device is illegal and the employer, the employee, and the union are subject to criminal as well as civil sanctions. *Accord, Denver Milk Producers Inc. v. International Brotherhood of Teamsters Union*, 116 Colo. 398, 183 P.2d 529, 547 (1947); *see also, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers v. Publix Cab Co.*, 119 Colo. 208, 202 P.2d 154 (1949). Most crucial to this court is the emphasis on employee rights.

Perhaps the case most clearly in point in Colorado is *Barbers Union v. Industrial Commission*, 128 Colo. 121, 260 P.2d 941 (1953), in which the union tendered a contract which would require an employer and his employees to become members of the union so that he could continue to display a union shop barber card in his window. No referendum was conducted. Since there had been none, the court concluded that the union did not have the right to require the employer to agree to such a clause, even though it accorded him a special "limited

membership," and held that the union's action was opposed to the public policy of the state of Colorado as declared by the legislature in the Labor Peace Act. Again, our Supreme Court relied upon the declaration of employee rights and public policy as enunciated in C.R.S. §80-4-1. Also, it characterized the union demand as an unfair labor practice under C.R.S. §80-4-6(1)(b), (d), (f), because no referendum and concomitant affirmative approval by three-quarters of the employees appeared of record. What the court considered most crucial was that the union proposed to require something which had been declared prohibited and in violation of legislative intent, as recognized by Colorado courts relying upon Wisconsin precedent. The court also emphasized that the union was attempting to eliminate the employer's right to vote and compel him to become a member of a labor organization without exercise of that right, *stating that the right to vote was an essential element of a man's ability to join or not to join a labor organization or become a full member thereof:*

> In the consideration of statutes, courts are not guardians of the rights of the people except as those rights are secured by constitutional provision, and if a statute does not offend the Constitution, it is the duty of courts to carry it into execution according to its true intent and purpose. 'It cannot pass upon its expediency or policy; those are questions upon which the legislature has passed, and its judgment cannot be reviewed by the courts.' 128 Colo. at 134.

See also United Mine Workers v. Golden Cycle Corp. 134 Colo. 140, 300 P.2d 799 (1956), in which the court characterized the union's efforts to obtain an all-union contract without a proper election as illegal. The provisions of the Colorado Labor Peace Act specifically were declared constitutional in *American Federation of Labor v. Reilly,* 113 Colo. 80, 155 P.2d 145 (1944).

The last case worthy of note is *Pueblo Building & Construction Trades Council v. Harper Construction Co.,* 134 Colo. 469, 307 P.2d 468 (1957), in which the trial court's grant of an injunction against a labor union was reversed. There appeared to be only one picket in this case, and there was no indication that the union was attempting to require the execution of a labor contract containing a union security clause without first conducting a referendum. In fact, the court distinguished its prior actions in the *Denver Milk Producers* and *Green* cases, *supra,* by noting that, "in each of these cases the court determined that the union was picketing for an unlawful objective [i.e. the execution of a union security clause without the necessary referendum under state law]." 134 Colo. at 479. In that language, the court again indicates the need for an "all union" referendum as a prerequisite to the validity of a union security clause.

The import of the foregoing cases is clear to this court. The Colorado Labor Peace Act protects fundamentally each worker's free choice to join, refrain from joining, or quit a labor organization. Any contract clause which interferes with that right must be "strictly construed" as in derogation of those rights. C.R.S. §80-4-4. Thus, while the precise holdings of those cases are not important, the objective and policy of the Colorado legislature as clarified therein is, and must guide the resolution by this court of the present controversy.

18. *Building Construction Trades Council, A.F.L. v. American Builders, Inc.,* 139 Colo. 236, 337 P.2d 953 (1959), does not compel a different conclusion or approach. In that case – decided prior to either of the *Schermerhorn* decisions the *General Motors* decision and *Local No. 438 v. Curry,* 371 U.S. 542 (1963) – the Colorado Supreme Court reversed a district court decision granting an employer an injunction

against a union to restrain its members from peaceful picketing in an effort to compel non-union employees to join the union, contrary to provisions of the Colorado Labor Peace Act dealing with "all-union" agreements. The decision recognized that §14(b) sanctions state "right-to-work" laws but does not apply to such picketing situations. The specific basis of decision was that the conduct complained of arguably was an unfair labor practice under the N.L.R.B. and so Colorado courts were without jurisdiction to proceed in the absence of a cession of jurisdiction by the Board, and has no powers of enforcement. *Contra, Retail Clerks v. Schermerhorn, supra,* 375 U.S. 96 (1963), holding that state power over union security agreement begins with their "execution and application." In *dictum,* Stating Colorado had no "right-to-work" law, the Colorado Supreme Court erroneously assumed that the same principle restricting state power over peaceful picketing would govern cases in which a state sought to regulate union security devices permissible under federal law, a power preserved to the states since the 1935 Wagner Act, and confirmed by §14 (b).

What the court failed to recognize was that enjoining peaceful picketing and regulating union security are subject to divergent treatment under federal law. Preemption applies in the former: but because of the congressional philosophy of the Wagner Act and statutory codification in §14(b), it does *not* in the latter circumstance. Preemption applies to *union* rights, but not to *employee* rights. In the sense that the court recognizes the vitality of §14(b), at least in *per se* right-to-work states, it was correct; but it is patently *wrong* in the statement that §14(b) applies only when a union security agreement cannot be executed or applied in any circumstances. Ten years earlier, *Algoma Plywood & Veneer Co. v. W.E.R.B.*, ruled that under §14(b), states could *prohibit* as well as *regulate* the application of union security agreements and that no federal pre-

emption was involved in those circumstances. *See also, N.L.R.B. v. General Motors and Retail Clerks v. Schermerhorn, supra.* That oversight may be excused because it was not until the second *Schermerhorn* decision, 375 U.S. 96 (1963), that the United States Supreme Court defined specifically the limits of state action: §14(b) empowers the states to act after the execution and application of the union security agreement, i.e., after the union writes it and attempts to enforce it. If the union pickets before to obtain such a clause, its rights are protected under federal law. It has no concomitant "right" in Colorado to coerce workers' choice. Consequently, this court declines to use that case as the basis of a binding interpretation of the Labor Peace Act.

19. Also inapplicable to the present controversy are cases considering clauses which do not embody the "practical equivalent of compulsory unionism" and which are not involved in the present controversy, such as check-off authorizations, in which state law is preempted by §302 of the Landrum-Griffin Act of 1959 and nondiscriminatory hiring halls. *E.g., N.L.R.B. v. Houston Chapter, Associated General Contractors,* 349 F.2d 449 (5th Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966); *Sea-Pak v. Professional Employees,* 300 F. Supp. 1197 (S.D. Ga. 1969), *aff'd.*, 423 F.2d 1229 (5th Cir. 1970), *aff'd.*, 400 U.S. 985 (1971). The clauses before the court all involve "the practical equivalent of compulsory unionism –" the payment of money to a labor organization, and, hence, they are legally and factually distinguishable.

20. Colorado regulates all union security devices requiring "membership" in a labor organization as that term is defined by Section 8(a)(3) of the National Labor Relations Act, including but not limited to the union shop, the agency shop, maintenance of membership, maintenance of dues and modi-

fied agency shop provisions. Article 24 of Contract CWA-12; Article 23 of Contract CWA-JC-12; Article 24 of Contract CWA-13; Article 23 of Contract CWA-JC-13 and all Mountain Bell clauses noted above are union security clauses subjected to state regulation by the Wagner Act and §14(b) and "all-union" agreements within the meaning of the Colorado Labor Peace Act because they require that existing union members, all transfers into the bargaining unit, and all newly hired employees make periodic dues payments to one union — the Plaintiff. That is an "establishment" within the meaning of C.R.S. §80-4-2(8). Furthermore, except for an insubstantial and no longer applicable ten day escape clause, (which never existed in fact for 1971 contracts), each absolutely prevents all covered employees from withdrawing from the union and *compels* them to pay dues for up to two years from the time they enter the bargaining unit regardless of their wishes or desires. No one can now withdraw from the union whether he wants to or not. That is contrary to Colorado law. In the absence of such an "all-union" 'agreement, employees in Colorado, as noted above, are guaranteed the right to determine whether to support a labor organization at all times by C.R.S. §80-4-4, and that includes the freedom to withdraw from union activity at any time. All those affected employees would lose their rights guaranteed by C.R.S. §80-4-4 if Plaintiff's argument were to prevail. Those bargaining unit members who utilized their statutory rights under C.R.S. §80-4-4 to resign from plaintiff would now be required to join plaintiff and remain members or lose their jobs if they did not and the court decreed enforcement of the contract clauses in issue. A more blatant disregard of legislative direction and employee rights, the court cannot imagine! The simple fact is that there is no way now — and was none after July, 1971 — for these employees to leave the union and keep their jobs under the clauses in issue. That the union has attempted to apply that sanction under these same

clauses is stipulated. To conclude that such a clause does not destroy employee freedom of choice and hence is not an "all-union" agreement is to ignore reality and the policy dictates of the legislature. Consequently, the Court concludes that each union security clause before the court is an invalid "all-union" agreement because no "all-union" referendum has been conducted pursuant to C.R.S. §80-4-6(d).

21. Since Article 24 of CWA-12, Article 23 of CWA-JC-12, Article 24 of CWA-13, and Article 23 of CWA-JC-13 and the Mountain Bell clauses are illegal, invalid and prohibited by Colorado law, plaintiff may not rely upon the same to effect the discharge of any employee refusing to comply with the terms thereof, and for defendants Western Electric and Mountain Bell to enforce said contract clauses at the behest of plaintiff to terminate the affected employees would constitute unlawful discrimination in regard to the terms or conditions of said employees' employment and an unfair labor practice within the meaning of C.R.S. §80-4-6(1)(d) of Colorado Labor Peace Act, as in contravention of essential employee rights of freedom of choice whether to join or support any labor organization. No employees of defendants Western Electric and Mountain Bell validly may be discharged pursuant to any of said contract provisions and said defendants lawfully refused the demand for discharge. For defendants to have enforced the clauses in issue against any employees failing to comply with their terms under present facts would have subjected them to additional civil and criminal penalties specified in the Colorado Labor Peace Act.

JUDGMENT

On the basis of the foregoing findings of fact and conclusions of law the Court declares and orders as follows:

(1) All contract clauses in issue and referred to above are declared to be illegal, invalid and unenforceable "all-union" agreements since no validating "all-union" referendum has been conducted by the Industrial Commission of the State of Colorado and approved by a three-quarter vote of the affected membership of plaintiff; and

(2) No employee of defendants Mountain Bell and Western Electric may be discriminated against by any party to the aforesaid collective bargaining contracts in controversy before this court in regard to any term, condition, or tenure of his or her employment for failing to comply with any of said union security clauses.

Dated at Denver, Colorado, this 9th day of September, 1974.

BY THE COURT:

s/James C. Flanigan
Denver District Judge

APPENDIX B

PROCEEDINGS BEFORE COLORADO SUPREME COURT

1. Opinion of Colorado Supreme Court.

NO. 26651
and
NO. 26797

COMMUNICATIONS WORKERS OF AMERICA, an unincorporated labor association,

Plaintiff-Appellant,

v.

WESTERN ELECTRIC COMPANY, INCORPOATED, a New York corporation, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado, ALBERT F. MANGAN, in his capacity as a member of the Industrial Commission of the State of Colorado, and KENNETH G. RUSSELLL, in his capacity as a member of the Industrial Commission of Colorado, and THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado corporation,

Defendants-Appellees

Appeal From the District Court of the City
and County of Denver
Honorable James C. Flanigan, Judge

EN BANC JUDGMENT AFFIRMED

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MR. JUSTICE ERICKSON delivered the Opinion of the Court.

This is an appeal by the plaintiff, Communications Workers of America (an unincorporated labor association, hereinafter referred to as C.W.A.) from an adverse decision of the District Court for the City and County of Denver. The defendants are the Western Electric Company, Inc., a New York corporation; the State of Colorado, Department of Labor and Employment, Division of Labor; James M. Shaffer, Executive Director of the Division of Labor; the Industrial Commission of the State of Colorado; Henry C. Kimbrough, Albert F. Mangan, and Kenneth C. Russell, members of the Industrial Commission; and the Mountain States Telephone & Telegraph Co., a Colorado corporation.

This appeal followed a determination by the district court of a consolidated action which was submitted as an agreed case and on stipulated records and evidence pursuant to C.R.C.P. 7(d). No significant issues of fact are in controversy. The relief prayed for was a declaration of the rights, status, and legal relations of the Communications Workers of America under certain union security provisions contained in collective bargaining agreements with the defendants Mountain States Telephone & Telegraph Co., and the Western Electric Co., Incorporated. The petitioner sought a declaration that the union

security provisions were valid and enforceable in the absence of an "all-union" referendum conducted by the director of the Division of Labor.

The district court determined that declaratory relief, pursuant to C.R.S. 1963, 77-11-1,[1] *et seq*, was appropriate and concluded that the contested provisions of the various collective bargaining agreements were illegal, invalid, and unenforceable. *See also* C.R.C.P. 57. We affirm.

The international headquarters of the plaintiff, C.W.A., is located in Washington, D.C., and its principal place of business in Colorado is in Denver. Under certain collective bargaining agreements entered into in 1968 and 1971, C.W.A. became lawfully entitled to represent, as the exclusive bargaining agent, certain employees in the industrial field forces of the Service Division of Western Electric Company, Incorporated, in several states of the United States, including Colorado. C.W.A. is also, pursuant to other collective bargaining agreements, lawfully entitled to represent, as the exclusive bargaining agent, certain employees in the Plant and Traffic Departments of The Mountain States Telephone and Telegraph Company (hereinafter Mountain States).

In this appeal, seven collective bargaining agreements, with attendant union security clauses, are at issue. Three of these were entered into between C.W.A. and Mountain States and four were entered into between C.W.A. and Western Electic. The details of the contested union security clauses of the several collective bargaining agreemnts will be set forth in the text of this opinion.

On May 9, 1968, a collective bargaining agreement was entered into between C.W.A. and defendants, Mountain States

[1]Now section 13-51-105, C.R.S. 1973.

and the Division of Labor, covering certain employees in the Plant Department of Mountain States. This agreement reads, in pertinent part:

> "2.1 The Company and the Union agree that they will not interfere with the rights of employees to join or refrain from joining the Union and agree that they will not in any manner, because of an employee's membership or nonmembership therein directly or indirectly discriminate against, interfere with, coerce, restrain, discharge, demote, transfer, or discipline any employee.
>
> . . . .
>
> "14.1 Each employee who is a member of the Union on or after the 30th calendar day following the beginning of his employment, or on or after the effective date of this Agreement, whichever is the later, shall as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the termination of this Agreement, except that each such employee may, within the 10-day period immediately preceding May 9, 1971, upon which date the Agreement terminates, terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company in writing of his withdrawal from membership in the Union.
>
> "14.2 Said condition of employment shall reapply to any such employee after his return to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

"14.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such State.

"14.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article."

On the same date, another collective bargaining agreement was entered into between C.W.A. and Mountain States and the Division of Labor covering certain employees in the Traffic Department of Mountain States, which provides:

"1.1 The Company, its officers and supervisors, shall not interfere with the rights of employees to become and remain members of the Union and shall not in any manner, directly or indirectly, discriminate against, interfere with, coerce, restrain, discharge, demote, transfer or discipline any employee by reason of his or her membership or non-membership in the Union.

. . . .

"Article 15

"Section 1: Maintenance of Dues

"1.1 Each employee who is a member of the Union on or after the 30th calendar day following the beginning of her emplyoment, or on or after the effective date of this Agreement, whichever is the later, shall as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the termination of this

Agreement, except that each such employee may, within the 10 day period, immediately preceding May 9, 1971, upon which date the Agreement terminates, terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company in writing of her withdrawal from membership in the Union.

"1.2 Said condition of employment shall reapply to any such employee after her return to the bargaining unit following transfer out of the bargaining unit, any removal from the payroll of the Company, or any Leave of Absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following her return to the bargaining unit.

"1.3 The provisions of this Article shall not apply to any employee in any State in which the application of such provision would be inconsistent with the law of such State.

"1.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article."

During the term of the first two Mountain States collective bargaining agreements, numerous Colorado employees of Mountain States within the bargaining units covered by the foregoing agreements were members of C.W.A. Their membership was in effect on or after the thirtieth calendar day following the beginning of their employment or on or after the effective date of the agreement. Thereafter, several employees ceased paying or tendering to C.W.A. an amount equal to their periodic union dues. The payments were not ceased within

the ten-day period immediately preceding the termination date of the applicable collective bargaining agreement, the "escape" period under the contracts.

On or about June 3, 1970, and again on or about September 3, 1970, C.W.A. demanded that Mountain States dismiss the employees who had ceased paying or tendering to the union an amount equal to their periodic union dues. C.W.A. alleged that the employees were in violation of the contract provisions set out above. Mountain States refused to dismiss the employees contending that the above-cited provisions were not binding because of the provisions of the Colorado Labor Peace Act, C.R.S. 1963, 80-4-1,[2] *et seq* (as amended).

Another collective bargaining agreement was entered into between C.W.A. and Mountain States and the Division of Labor on or about the 18th of July, 1971. This agreement covered certain employees of the Plant and Traffic Department of Mountain States, and set forth:

> "2.1 The Company and the Union agree that they will not interfere with the rights of employees to join or refrain from joining the Union and agree that they will not in any manner, because of an employee's membership or nonmembership therein directly or indirectly discriminate against, interfere with, coerce, restrain, discharge, demote, transfer, or discipline any employee.
>
> . . . .
>
> "Article 21
>
> Modified Agency Shop
>
> "21.1 Each regular employee who is a member of the Union on the date of ratification or approval of this

[2]Now section 8-3-101, C.R.S. 1973.

> agreement by the President of the Union, whichever is later, or who later becomes a member of the Union and all regular employees hired on or after that date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of regular employees hired on or after such date of ratification or approval, 30 days after hire, whichever of these dates is later until the termination of this contract, except that an employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his withdrawal from membership in the Union by registered mail, return receipt requested, and postmarked within the ten-day calendar period immediately preceding 11:59 P.M., July 28, 1971.
>
> "21.2 Said condition of employment shall reapply to any such employee after returning to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following return to the bargaining unit.
>
> "21.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such State.
>
> "21.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article."

Defendant Western Electric Company Incorporated entered into a collective bargaining agreement with C.W.A. on May 1, 1968, covering certain communications equipment workers in the installation field forces of the Service Division of Western Electric. This contract was denominated as Contract C.W.A.-12 and provides:

"ARTICLE 24

Maintenance of Union Dues

1. Each Employee who is a member of the Union:

(a) on or after the 30th calendar day following the beginning of his employment, or

(b)on or after the effect date of this contract

whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this contract, except that each such Employee may, within the ten (10) day period immediately preceding the termination date of this contract, terminate his obligations to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company of his withdrawal from membership in the Union.

"1.1 Said condition of employment shall reapply to any such Employee after his return to the bargaining unit following any period of formal separation* therefrom, provided such Employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

*Includes:
Transfers out of the bargaining unit.
Removal from the payroll of the Company.
Leaves of Absence of more than one (1) month duration.

"2. The provision of this Article 24 shall not be effective if inconsistent with the law of the applicable State.

"3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this Article 24.

Because job clerks are also employed in the installation field forces of the Service Division of Western Electric, a separate collective bargaining agreement was entered into with C.W.A. on May 1, 1968, covering these employees, and denominated as Contract C.W.A.-JC-12, Article 23 of Contract C.W.A.-JC-12, states:

"ARTICLE 23

Maintenance of Union Dues

"1. Each Employee who is a member of the Union:

(a) on or after the 30th calendar day following the beginning of his employment, or
(b) on or after the effective date of this contract,

whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this contract, except that each such Employee may, within the

10 day period immediately preceding the termination date of this contract terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company of his withdrawal from membership in the Union.

"1.1 Said condition of employment shall reapply to any such Employee after his return to the bargaining unit following any period of formal separation* therefrom, provided such Employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

*Includes:
Transfers out of the bargaining unit.
Removal from the payroll of the Company.
Leaves of Absence of more than one (1) month duration.

"2. The provisions of this Article 23 shall not be effective if inconsistent with the laws of the applicable State.

"3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this Article 23."

During the term of these two collective bargaining agreements with C.W.A. numerous Colorado employees of Western Electric in the appropriate bargaining unit covered by the agreements were members of C.W.A. either on or after the thirtieth calendar day following the beginning of their employment or on or after the effective date of the applicable agreement. These employees ceased paying or tendering to the union an amount equal to their periodic union dues, and in

each case, cessation did not occur within the "escape" period under the agreements.

On June 5, 1970, C.W.A. demanded of Western Electric that it take action under the two 1968 collective bargaining agreements and terminate Western Electric's employees. Western Electric replied that before an employer may enter into an agreement providing for union security in Colorado, the Industrial Commission of Colorado must certify that three-quarters or more of the bargaining unit employees shall have voted affirmatively in a referendum in favor of such an agreement. A letter went on to describe Western Electric's position:

". . . since no such referendum has been conducted among the bargaining unit employees based in Colorado, it would violate Colorado law to condition the employment of these employees upon the payment of union dues. Accordingly, we must deny your request that the Company terminate the above-named employees because of their alleged failure to pay dues to the Union because the contract articles have no effect in light of the provisions of the Colorado Labor Peace Act, C.R.S. 80-4-1 (1963), et seq., as amended."

Contract C.W.A.-13 was entered into between Western Electric and C.W.A. in July, 1971, covering certain communication equipment workers of the installation field forces of the Service Division of the company. Article 24 of C.W.A.-13 provides, in pertinent part:

"ARTICLE 24

Union Security

"1. Each Employee who is a member of the Union

on the date of ratification or approval of this Contract by the President of the Communications Workers of America, whichever is later, or who later becomes a member of the Union and all Employees hired on or after such date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval of the date of later becoming a member or, in the case of Employees hired on or after such date of ratification or approval, thirty (30) days after hire, whichever of these dates is later until the termination of this Contract, except that an Employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his or her withdrawal from membership in the Union, by registered mail, return receipt requested, and postmarked with the ten (10) day calendar period immediately preceding 11:59 P.M. July 27, 1971.

"2. The condition of employment specified in Paragraph 1 shall not apply during the period of formal separation* from the bargaining unit by any such Employee but shall reapply to such Employee on the thirtieth (30th) day following his or her return to the bargaining unit.

*The term 'formal separation' includes transfers out of the bargaining unit, removal from the payroll of the Company, and Leaves of Absence of more than one (1) month duration.

"3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this article.

"4. This article shall apply only in those States and

the District of Columbia where the law permits the Union to enter into this type of union security agreement. If during the term of this Contract the Union shall become duly authorized under the laws of any other State to enter into this type of union security agreement, the effective date of this article as to Employees in such State shall be the date upon which the Company receives proper written evidence from the Union that it is fully qualified to enter into such an agreement in such State.

Another collective bargaining agreement was entered at the same time as C.W.A.-13, covering job clerks employed in the installation field forces of the Service Division of Western Electric. This agreement was denominated as C.W.A.-JC-13. Article 23 of that agreement is relevant and provides:

"ARTICLE 23

Union Security

"1. Each Employee who is a member of the Union on the date of ratification or approval of this Contract by the President of the Communications Workers of America, whichever is later, or who later becomes a member of the Union and all Employees hired on or after such date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of Employees hired on or after such date of ratification or approval, thirty (30) days after hire, whichever of these dates is later until the termination of this Contract, except that an Employee may terminate this condition of employment by giving written notice to the Company and

the Union of such termination, and, if applicable, his or her withdrawal from membership in the Union, by registered mail, return receipt requested, and postmarked within the ten (10) day calendar period immediately preceding 11:59 P.M., July 27, 1971.

"2. The condition of employment specified in Paragraph 1 shall not apply during the periods of formal separation* from the bargaining unit by any such Employee but shall reapply to such Employee on the thirtieth (30th) day following his or her return to the bargaining unit.

*The term 'formal separation' includes transfers out of the bargaining unit, removal from the payroll of the Company, and Leaves of Absence of more than one (1) month duration.

"3. The company may inform Employees and applicants for employment of their rights and obligations under the provisions of this article.

"4. This article shall apply only in those States and the District of Columbia where the law permits the Union to enter into this type of union security agreement. If during the term of this Contract the Union shall become duly authorized under the laws of any other State to enter into this type of union security agreement, the effective date of this article as to Employees in such State shall be the date upon which the Company receives proper written evidence from the Union that it is fully qualified to enter into such an agreement in such State."

An "all-union" referendum election under the provisions

of 1969 Perm. Supp., C.R.S. 1963, 80-4-6(1) (d)[3] has not been held with respect to any of the collective bargaining agreements. The primary issue in this appeal is whether the provisions of the Colorado Labor Peace Act, C.R.S. 1963, 80-4-1, *et seq* (as amended), operate to preclude enforcement of the union-security provisions contained in the various agreements.

The district court opinion recognized that federal law almost totally preempts state law in the area of labor relations, but that neither the National Labor Relations Act, 29 U.S.C. § 151, *et seq* (1964),[4] the Labor-Management Relations Act (hereinafter the Taft-Hartley Act) – see particularly 29 U.S.C. § 164(b) (1964) – nor any other federal law preempts the provisions of the Colorado Labor Peace Act regulating "all-union" security agreements, 1969 Perm. Supp., C.R.S. 1963, 80-4-6(1) (d). The district court concluded that section 80-4-6(1) (d)[5] of the Colorado Labor Peace Act prohibits "any union security clause contained in any collective bargaining agreement as long as the clause contains any mandate which compels an employee's financial support or allegiance to the

[3]Section 80-4-6(1) (d) makes it an unfair labor practice:

"(1) (d) To encourage or discourage membership in any labor organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees, in a collective bargaining unit, where three-quarters or more of his employees have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director. The director shall declare any such all-union agreement terminated whenever he finds that the labor organization involved unreasonably has refused to receive as a member any employee of such employer, and each such all-union agreement shall be made subject to this duty of the director. Any person interested may come before the director, as provided in section 80-4-8, as amended, and ask the performance of this duty.

[4]Otherwise known as The Wagner Act.

[5]Now section 8-3-108(1) (c), C.R.S. 1973.

labor organization regardless of name, including, but not limited to, the union shop, agency shop, modified union shop, modified agency shop, discriminatory hiring halls, maintenance of dues, maintenance of membership and the like" in the absence of a referendum election under the Colorado Labor Peace Act. The district court further found that this provision of the Colorado Labor Peace Act was applicable to employers engaged in interstate commerce doing business within the State of Colorado. The court refused to construe the provision as covering only union shop clauses. Throughout the opinion, the court emphasized that the fundamental purpose of the Colorado Labor Peace Act was to protect the right of each individual employee to determine for himself whether or not to engage in union activity. In the absence of a referendum approving the agreement, the court held that any negotiated "all-union" security agreement was invalid. The court also noted that the Colorado Labor Peace Act must be construed to allow employees the freedom to withdraw from union activity in the absence of the required referendum. On the basis of these conclusions of law, the district court declare that each of the disputed clauses here in issue was invalid and unenforceable because no all-union referendum had been conducted pursuant to 1969 Perm. Supp., C.R.S. 1963, 80-4-6(1) (d). Moreover, the court held that C.W.A. could not rely on the invalid clauses to effect a discharge of any employee refusing to comply with the terms thereof, and that the respondents lawfully refused the demands for the discharge of the employees.

All-Union Agreements

Plaintiff, C.W.A. argues that the union security clauses here in issue are not "all-union agreements" because "all" of the employees of the two employers are not required to be members of a single labor organization. Correlatively, C.W.A.

argues that Colorado only proscribes the "closed shop" form of union security. We disagree.

An "all-union agreement" is defined in C.R.S. 1963, 80-4-2(8)[e] as:

> ". . . an agreement between an employer and a collective bargaining unit representing some or all of his employees, whereby all of the employees of an employer in a craft or an establishment are required to be members of a single labor organization."

C.W.A. emphasizes the use of the word "all" in the above definition and concludes that the present union security clauses are not subject to regulation since they do not require membership in C.W.A. by "all" of the respective employers' employees in a collective bargaining unit. Generally, the instant union-security agreements fall into two categories: maintenance of membership agreements [the 1968 Plant Division and Traffic Department agreements between C.W.A. and Mountain States; and contracts C.W.A.-12 and C.W.A.-JC-12 between C.W.A. and Western Electric]; and modified agency shop agreements [the 1971 Plant and Traffic agreement between C.W.A. and Mountain States; and contracts C.W.A.-13 and C.W.A.-JC-13 between C.W.A. and Western Electric]. Under neither of the above types of agreements were all employees in the affected bargaining units required to become members of C.W.A. Moreover, "escape" periods were provided in the agreements during which time employees could sever any obligation to retain membership and/or pay dues to C.W.A.

Generally, under a maintenance of membership provision, employees who have become members of the union are re-

[e]Now section 8-3-104(1), C.R.S. 1973.

quired to maintain their membership in good standing as a condition of employment. The escape clause may be utilized by the employees to renounce their membership. Under an agency shop agreement, non-union employees whom the union represents as part of the collective bargaining unit must pay, as a condition of their continued employment, an amount equivalent to the sums paid by union employees for initiation fees and dues. Union membership is not required by the agency shop agreement. The present agency shop agreements were modified as a consequence of the "escape" clause features of the contracts.

The interpretation of "all-union agreement" which C.W.A. advances would subvert important policy declarations embodied in the Colorado Labor Peace Act. C.R.S. 1963, 80-4-4,[7] provides that employees shall be free to join or refrain from joining or assisting labor organizations:

> "Such rights of employees and each and all of them are essential rights and nothing herein contained shall be so construed as to infringe upon or have any operation as against or in conflict with such rights and each and all of them." C.R.S. 1963, 80-4-4.

This language evinces an intent on the part of the legislature to protect the working man's right to freely chart his own course with regard to labor organization activities. Section 80-4-6(1) (d) is a further manifestation of that legislative intent in that it severely restricts the circumstances in which an employee may be subjected to "all-union agreements." If C.W.A. were to prevail in its argument that only "closed shop" agreements are regulated by section 80-4-6(1) (d), no compulsory union provision would be subject to regulation as long as

[7]Now section 8-3-106, C.R.S. 1973.

a single employee were exempt from compelled payment of dues or their equivalent. Under such circumstances, the union would be free to ignore with impunity the referendum provisions of the statute and also demand compliance with any union security device other than a closed shop agreement.

In view of the emphatic language contained in the legislative declaration of rights of employees, C.R.S. 1963, 80-4-4, regulation of "all-union agreements" is not limited to closed shop agreements. The fact that section 80-4-2(8) defines "all union agreement" in terms of a union "membership" requirement, and the agreements herein did not require "membership" *per se,* does not deter us from our conclusion. Compulsory monetary support of a union is the "practical equivalent" of compulsory membership. *Retail Clerks v. Schermerhorn,* 373 U.S. 746, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963); *see also NLRB v. General Motors Corp.,* 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963). In our opinion, any financial obligation imposed upon employees pursuant to a collective bargaining agreement executed and sought to be enforced in Colorado has features of compulsory unionism and as such is to be considered an "all-union agreement" under C.R.S. 1963, 80-4-2(8).

We interpret the word "establishment" in 80-4-2(8) to mean a recognized or defined group of employees, not necessarily *all* of the employees in a particular collective bargaining unit. The statute expressly states that the agreement may be between an employer and a collective bargaining unit representing "some" of his employees. Hence, the fact that some of the employees of Mountain States or Western Electric may not have been subject to the compulsory union-security provisions in issue does not exclude such provisions from regulation under 80-4-6(1) (d). Absent the requisite referendum, union-security clauses such as the ones here in issue are invalid and

unenforceable under the Colorado Labor Peace Act. *But cf., Building Construction Trades Council, AFL v. American Builders, Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

Necessity of a "Collective Bargaining Unit"

The union-security provision of the Colorado Labor Peace Act, 1969 Perm. Supp., C.R.S. 1963, 80-4-6(1) (d), provides that encouragement of membership in a labor organization by discrimination "in regard to hiring, tenure, or other terms or conditions of employment" is an unfair labor practice. The statute, however, delineates an exception to the general rule:

> " . . . [A]n employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees, *in a collective bargaining unit*, where three-quarters or more of his employees shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director." [Emphasis added.]

C.W.A. contends that a "collective bargaining unit" as defined by the Colorado Labor Peace Act is a condition precedent to the holding of a referendum under section 80-4-6(1) (d). In our opinion, the statute plainly directs that the referendum should be conducted among the employees of a collective bargaining unit. The Colorado Labor Peace Act, C.R.S. 1963, 80-4-2(6),[8] defines "collective bargaining unit" as:

> ". . . an organization selected by secret ballot, as provided in section 80-4-5, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such unit, provided

[8]Now section 8-3-104(4), C.R.S. 1973.

> that where a majority of such employees engaged in a single craft, division, department, or plant shall have voted, by secret ballot, that the employees of such single craft, division, department or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or representatives where a majority of the employees in each separate unit shall have voted so to do by secret ballot, as provided in section 80-4-5."

All of the bargaining units involved in this appeal have been recognized or certified by the National Labor Relations Board, and no evidence suggests that any of them were established by a secret ballot election pursuant to section 80-4-2(6). In our view, a secret ballot election, as described by section 80-4-2(6), is the exclusive method by which a collective bargaining unit subject to the "all-union" referendum provisions of section 80-4-6(1) (d) may be recognized. Correlatively, we hold that a collective bargaining unit, as defined by section 80-4-2(6), is a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law. Inasmuch as no secret ballot election was conducted for the purpose of establishing a collective bargaining unit authorized to enter into an all-union agreement with Mountain States and Western Electric, C.W.A. is not entitled to the enforcement of the all-union agreements provisions which are, in our opinion, invalid. Even if such an election had been held and an appropriately authorized collective bargaining unit had been established, the union security provisions here in issue would be invalid and unenforceable because of the lack of employee approval through an all-union referendum.

Federal Preemption

C.W.A. urges that this court should declare section 80-4-6(1) (d) invalid on grounds of federal preemption. C.W.A. contends that the definition of "collective bargaining unit" defined by section 80-4-2(6), and operative in section 80-4-6(1) (d), is preempted by the definition of "collective bargaining unit" contained in section 9 of the National Labor Relations Act, 29 U.S.C. § 151, *et seq* (1964).

We agree that certification or recognition under the Federal Act is different than the recognition/definition section of the Colorado Labor Peace Act. The Colorado Labor Peace Act requires a secret ballot election conducted by the division of labor in which a majority of the employees of the employer or a majority of the employees in a craft must vote. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), however, the Supreme Court of the United States recognized that the duty to bargain may be established under the Federal Act by methods other than by a secret ballot election:

> "The most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board's election and certification procedures under §9(c) of the Act. . . . A union is not limited to a Board election, however, in addition to §9, the present Act provides in §8(a) (5) . . . as did the Wagner Act in § 8(5), that '[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). Since section 9(a) in both the Wagner Act and the present Act, refers to the representative as the one "designated

> or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support."' Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of §8(a) (5) – by showing convincing support, for instance, by union-called strike or by strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes."

No one disputes that the employers in this appeal are engaged in commerce and are subject to the various provisions of the National Labor Relations Act and the Labor-Management Relations Act of 1946, as amended, 29 U.S.C. §141, *et seq.* The federal pre-emption doctrine was restated in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 991 S.Ct. 1909, 29 L.Ed.2d 493 (1971), where the Supreme Court said:

> "The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter."

The *Lockridge* case affirmed the principles established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), where the United States Supreme Court declared:

"When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the states free to regulate conduct to plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."[9]

C.W.A. urges that the recognition or certification procedures outlined in section 80-4-2(6) of the Colorado Labor Peace Act are preempted by federal principles relating to recognition or certification of a collective bargaining unit. On this basis, C.W.A. contends that the utilization of the state certification procedures in the context of the state statute regulating union security provisions, 80-4-6(1) (d), renders the latter provision invalid and unenforceable. We need not speculate on the question of whether Colorado's procedures for establishing a collective bargaining unit are preempted by federal law in any context other than the one here in issue. We concern ourselves with the certification procedure only as it relates to the state's power to regulate union security clauses in collective bargaining agreements.

In that context, the policies embodied in the National Labor Relations Act and the Labor-Management Relations Act have been made expressly clear by the United States Supreme Court. The regulation of union security provisions is not a matter of exclusive federal concern, but states are free to pursue their own more restrictive policies. *Algoma Plywood &*

[9]§7, 29 U.S.C. §157;
§8, 29 U.S.C. § 158.

Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691 (1949).

We recognize that section 8(a) (3) of the Taft-Hartley Act, 29 U.S.C. §158(a) (d) (1964), disclaimed a national policy hostile to the closed-shop or other forms of union security agreement. *Algoma Plywood & Veneer Co., supra.*[10] Section 14(b), however, provided that:

"[N]othing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in and State or Territory in which such execution or

[10]Section 8(a) (3) reads as follows:

"It shall be unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act. or in any other statute of the United States shall preclude any employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

application is prohibited by State or Territorial law." 29 U.S.C. § 164(b).

According to *Algoma Plywood & Veneer Co., supra,* section 14(b) was included in the act to "forestall the inference that federal policy was exclusive in the matter of union security." *See also Retail Clerks Local 125 v. Schermerhorn,* 375 U.S. 96, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963). *See generally, Oil, Chemical & Atomic Workers International Union, AFL-CIO, et al. v. Mobil Oil Corp., et al.,* ____ U.S. ____, 92 L.R.R.M. 2737 (June 14, 1976). State power, pursuant to § 14(b), begins with the actual negotiation and execution of the type of agreement described by § 14(b). *Retail Clerks Local 125 v. Schermerhorn, supra.* Negotiation and execution of the contested agreements between C.W.A. and Mountain States and between C.W.A. and Western Electric has occurred, and thus the state's power under § 14(b) has become operative.

The issue of a state's power to recognize or certify collective bargaining units must not be confused with the state's power to regulate union-security agreements. In *Algoma Plywood & Veneer Co., supra,* the United States Supreme Court held that "[t]he character of activities left to State regulation is not changed by the fact of certification." We agree. In Colorado, a "collective bargaining unit" for purposes of the union security agreement provision of the Colorado Labor Peace Act, may be something different than a collective bargaining unit for other purposes of labor-management relations. In the context of section 80-4-6(1)(d), a collective bargaining unit is a unique entity which may only be established purusant to the requirements of section 80-4-2(6). Viewed as such, the procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit the application of union security agreements

under the permissive grant of authority contained in § 14(b) of the Taft-Hartley Act. The application of section 80-4-2(6) to the union security provisions of the Colorado Labor Peace Act is severable from its application in other contexts of the Act.

A valid all-union agreement may only be entered after the establishment of a collective bargaining unit in accordance with section 80-4-2(6). Having failed to properly define such collective bargaining units prior to entering the agreements here in issue, C.W.A. cannot properly demand that the employers enforce these invalid agreements.

Prohibition Under § 14(b)

C.W.A. contends that states, pursuant to § 14(b), are allowed to "prohibit" but not to "regulate" union security agreements. No matter how this distinction may be interpreted, § 14(b) does allow states to prohibit the "application" of union security agreements. In *Algoma Plywood & Veneer Co., supra,* the United States Supreme Court stated:

> "It is argued, however, that the effect of this section is to displace State law which 'regulates' but does not wholly 'prohibit' agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any 'application' of a union-security contract, such as discharging an employee, which under the circumstances 'is prohibited' by the State, the legislative history of the section would dispel it. . . ."

See also Retail Clerks v. Schermerhorn, 375 U.S. 96, 84 S.Ct.

219, 11 L.Ed.2d 179 (1963). The provisions of section 80-4-6(1) (d) are an important incident of the state's power to prohibit the application of union security provisions such as the ones here in issue. That power has not been supplanted by federal law.

The fact that § 14(b) refers to "membership" does not mean that state power to regulate union security agreements only extends so far as union or closed-shop agreements. *Retail Clerks Union v. Schermerhorn,* 373 U.S. 746, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963), held that an agreement conditioning employment upon the payment of sums equal to initiation fees and monthly dues was within the § 8(a) (3) proviso, and within the scope of § 14(b), and, thence, subject to invalidation by state law. The Court, in *Schermerhorn I,* stated that whatever may be the status of "less stringent union-security arrangements, the agency shop is within § 14(b)." *NLRB v. General Motors Corp., supra.* The modified agency shop clauses here in issue are hardly less stringent than the agency shop clause in the first *Schermerhorn* case. The limited "escape" provisions included in these agreements were of relatively inconsequential effect when measured against the more obvious purpose of the agreements – to insure C.W.A.'s security as the exclusive bargaining representative of the employees of Mountain States and Western Electric.

In short, Colorado was entitled under §14(b) to enact section 80-4-6(1)(d) of the Colorado Labor Peace Act, and the state's power to prohibit the application of the union security provisions here in issue is not preempted by federal law.

The enactment of § 14(b) would have been a meaningless gesture unless it was designed to affect a state's power over

employers and employees engaged in interstate commerce, and that is the only circumstance in which Congress could possibly have ceded power to the states under § 14(b). Therefore, section 80-4-6(1)(d) applies to union security clauses in collective bargaining agreements negotiated and executed by multi-state employers engaged in interstate commerce and doing business in Colorado.

Accordingly, we hold that the disputed clauses of the collective bargaining agreements between C.W.A. and Mountain States and between C.W.A. and Western Electric are union security clauses subject to state control under the Colorado Labor Peace Act. As enacted, the clauses were invalid because they were not approved through an all-union referendum by an appropriately designated employee group. C.W.A. may not rely on these clauses to effectuate a discharge of an employee refusing to comply with the terms thereof. Mountain States and Western Electric lawfully refused C.W.A.'s demand that the employees be discharged.

Accordingly, the judgment of the district court is affirmed.
MR. CHIEF JUSTICE PRINGLE dissents.

No. 26651 and No. 26797 – Communications Workers of America v. Western Electric Company, et al.

MR. CHIEF JUSTICE PRINGLE dissenting:

I respectfully dissent. Since the overwhelming majority of this court feels differently than I do, I shall not write at length or in depth.

I think there is no disagreement that the National Labor Relations Act, as amended, pre-empts labor relations from state regulation except where such is specifically authorized by the Act itself. Section 14(b) of the Taft-Hartley amendment does provide that states may *prohibit,* and I emphasize the word

used is *prohibit*. the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory. It does not, in its express language, allow states to regulate or do anything other than prohibit such agreements.

I would recall to the majority that Taft-Hartley was passed after a rather bitter battle, and that its terms therefore, should be strictly applied. It makes sense that the compromise was that union and agency shops may be entirely prohibited by a state, but if there was to be regulation, that regulation must be uniformly applied throughout the country under the terms of the National Labor Relations Act, rather than apply 50 different standards as to how and when union and agency shops might be negotiated.

I know the time-worn legal cliche that whatever a state can prohibit it can regulate. But this is not the situation for its application. We are here dealing with original pre-emption of the entire field by the federal government and the cession back to the states of a portion of that field. As I have pointed out, the history of that cession does not permit this court to reach out, as I think it does here, to grant the state powers not expressly given it by the Act itself. I do not read *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691 (1949) to hold otherwise. I do read several National Labor Relations Board decisions to be in accordance with my view. *Cyclone Sales, Inc.*, 115 NLRB 431 (1956); *Western Electric Co.*, 84 NLRB 1019 (1949); *Northland Greyhound Lines, Inc.*, 80 NLRB 288 (1948).

2. Order of Colorado Supreme Court Denying Communications Workers of America's Petition for Rehearing and Supplemental Petition for Rehearing.

IN THE SUPREME COURT
OF THE STATE OF COLORADO

Communications Workers of
America, an unincorporated
labor association,

Petitioner-Appellant,

26651 & 26797 v.

Western Electric Company,
et al.,

Appeal from the
District Court of the
City and County of Denver

Respondent-Appellee.

Upon consideration of the petition of petitioner-appellant for rehearing and the supplemental petition of petitioner-appellant for rehearing, it is this day ordered that the opinion of the court be, and hereby is, modified, and as modified petitions for rehearing be, and the same hereby are, denied.

3. Judgment of Colorado Supreme Court

IN THE SUPREME COURT
OF THE STATE OF COLORADO

Communications Workers of
America, an unincorporated
labor association,

Plaintiff-Appellant,

26651 & 26797 v.

Western Electric Company, Incorporated, a New York corporation, et al.,

Appeal from the District Court of City and County of Denver

Defendants-Appellees.

This cause having been brought to this court as an appeal to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

It is this day ordered and adjudged that the judgment of said District Court be, and the same hereby is, affirmed, and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said appeal.

By the Court. En Banc. July 7, 1976.

4. Letter Dated July 6, 1976 from Clerk of the Colorado Supreme Court to Attorneys for Appellant.

Clerk's Office

SUPREME COURT
State of Colorado
Denver 80203

July 6, 1976

Case No. 26651 and 26797
Communications Workers of America

v.

Western Electric Company, et al

Mr. Clay R. Smith,
Mr. John W. McKendree,
Attorneys and Counselors,
1050 Seventeenth St., Suite 1818,
Denver, Colorado 80202

Gentlemen:

Please substitute the enclosed pages 1, 2, 18, 20, 21 and 28 for the like numbered pages of the opinion of the court filed in the above numbered and titled case on June 7, 1976. The opinion was modified and as modified the petition for rehearing and supplemental petition for rehearing were denied.

Yours very truly,

RICHARD D. TURELLI, Clerk.
By s/Florence Walsh
Deputy Clerk

APPENDIX C

Text of Statutory Provisions Pertinent to Appeal.

1. Full text of Colorado Labor Peace Act*

8-3-101. Short title. This article shall be known and may be cited as the "Labor Peace Act".

8-3-102. Legislative declaration. (1) The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this article is enacted, is declared to be as follows:

(a) It recognizes that there are three major interests involved, namely: That of the public, the employee, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(b) Industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly, and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever legitimate controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration. It is also recog-

*All citations to the Labor Peace Act and the text herein are taken from Colorado Revised Statutes 1973.

nized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted in the conduct of their controversy to intrude directly or indirectly into the primary rights of third parties to earn a livelihood, transact business, and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, intimidation, restraint, or coercion.

(c) Negotiations of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation, an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own free choosing without intimidation or coercion from any source.

(d) All rights of persons to join labor organizations or unions and their rights and privileges as members thereof should be recognized, safeguarded, and protected. No person shall be denied membership in a labor organization or union on account of race, color, religion, sex, or by any unfair or unjust discrimination. Arbitrary or excessive initiation fees and dues shall not be required, nor shall excessive, unwarranted, arbitrary, or oppressive fines, penalties, or forfeitures be imposed. The members are entitled to full and detailed reports from their officers, agents, or representatives of all financial transactions and shall have the right to elect officers by secret ballot and to determine and vote upon the question of striking, not striking, and other questions of policy affecting the entire membership.

(e) In order to preserve and promote the interests of the public, the employee, and the employer alike, the state shall establish standards of fair conduct in employment rela-

tions and provide a convenient, expeditious, and impartial tribunal by which these interests may have their respective rights and obligations adjudicated, without limiting the jurisdiction of the courts to protect property, and to prevent and punish the commission of unlawful acts. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.

(f) It is declared to be the common law of the state that no act which if done by one person would constitute a crime under the common law or statutes of this state is any less a crime if committed by two or more persons or corporations acting in concert, and no act which under the common law or statutes of this state is a wrongful act for which any person has a remedy against the wrongdoer if done by one person is any less a remedial wrong if done by two or more persons or corporations in concert, nor shall the injured person be denied relief in the courts of this state in law or equity except as such relief may be expressly limited by statute.

8-3-103. Construction. Except as specifically provided in this article, nothing in this article shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work, nor shall anything in this article be so construed as unlawfully to invade the right to freedom of speech. Nothing in this article shall be so construed or applied as to deprive any employee of any unemployment benefit which he might otherwise be entitled to receive under any other laws of the state of Colorado. The fact that any provisions of this article have been adopted from other states, or the language of the statutes of other states has been used in the preparation of this article shall not be taken to adopt as the construction of such provisions the decisions of

other states construing such statutes of other states. It is not the intention of the legislature in adopting this article necessarily to adopt the construction that may have been placed upon similar provisions by the courts of other states.

8-3-104. Definitions. As used in this article, unless the context otherwise requires:

(1) "All-union agreement" means an agreement between an employer and a collective bargaining unit representing some or all of his employees, whereby all of the employees of an employer in a craft or an establishment are required to be members of a single labor organization.

(2) "Authority" means the state of Colorado; any board, commissions, agency, or instrumentality thereof; or any district, municipality, city and county, county, or combination thereof, which acquires or operates a mass transportation system.

(3) "Collective bargaining" means negotiation by an employer and the representative of a majority of his employees who are in a collective bargaining unit or their representatives concerning representation or terms and conditions of employment of such employees in a mutually genuinue effort to reach an agreement with reference to the subject under negotiation.

(4) "Collective bargaining unit" means an organization selected by secret ballot, as provided in section 8-3-107, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such unit, except that, where a majority of such employees engaged in a single craft, division, department, or plant have voted by secret ballot that the employees of such single craft, division, department, or plant shall constitute their collective

bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or where a majority of the employees in each separate unit have voted to do so by secret ballot, as provided in section 8-3-107.

(5) "Commission" means the industrial commission of Colorado.

(6) "Commissioner" means a member of the industrial commission of Colorado.

(7) "Company union" means an organization of employees, the members of which are the employees of only one employer.

(8) "Director" means the director of the division of labor.

(9) "Division" means the divsion of labor in the department of labor and employment.

(10) "Election" means a proceeding in which the employees authorized by this article cast a secret ballot to select a collective bargaining unit or for any other purpose specified in this article, including elections conducted by the division of labor or by any tribunal having competent jurisdiction or whose jurisdiction has been accepted by the parties.

(11) (a) "Employee" includes any person, other than an independent contractor, domestic servants employed in and about private homes, and farm and ranch labor, working for another for hire in the state of Colorado in a nonexecutive or nonsupervisory capacity, and shall not be limited to the em-

ployees of a particular employer and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer; and

(b) Who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employee or his representative;

(c) Who has not been found to have committed or to have been a party to any unfair labor practice under this article;

(d) Who has not obtained regular and substantially equivalent employment elsewhere; or

(e) Who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased, except by an employer's unlawful refusal to bargain, and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employee who is subject to the Federal Railway Labor Act.

(12) "Employer" means a person who regularly engages the services of eight or more employees, other than persons within the classes expressly exempted under the terms of subsection (11) of this section, and includes any person acting on behalf of any such exployer within the scope of his authority,

express or implied. The term does not include the state or any political subdivision thereof, except where the state or any political subdivision thereof acquires or operates a mass transportation system, or any carrier by railroad, express company, or sleeping car company subject to the Federal Railway Labor Act, Title 45, U.S.C.A., or any labor organization or anyone acting in behalf of such organization other than when he is acting as an employer-in-fact.

(13) (a) "Labor dispute" means any controversy between an employer and such of his employees as are organized in a collective bargaining unit concerning the rights or process or details of collective bargaining. The entering into of a contract for an all-union agreement or the refusal of an employer to enter into an all-union agreement shall not constitute a labor dispute. It shall not be a labor dispute where the disputants do not stand in the proximate relation of employer and employee. No jurisdictional dispute or controversy between two or more unions as to which of them has or shall have jurisdiction over certain kinds of work; or as to which of two or more bargaining units constitutes the collective bargaining unit as to which the employer stands impartial or ready to negotiate or bargain with whichever is legally determined to be such bargaining unit, shall constitute a labor dispute.

(b) The general right of an employer to select his own employees is recognized and shall be fully protected. It shall not constitute a labor dispute if an employer discharges or refuses to employ an employee on account of incompetence, neglect of work, unsatisfactory service, or dishonesty; but the discharge of an employee or the refusal to employ an employee shall constitute a labor dispute only when such discharge or refusal to employ is founded upon membership in a union or

labor organization or activity therein or when such discharge or failure to employ is in violation of a contract.

(c) No controversy between an employer and his employee shall constitute a labor dispute until after a bargaining unit in accordance with this article is created and a dispute arises between the bargaining unit and the employer.

(d) No labor dispute shall arise from the refusal of an employer to join a union or to cease work in his own business.

(14) "Local union" means an organization of employees employed in this state, the membership of which includes employees of one or more employers, whether or not they are affiliated with an organization of employees employed in one or more other states.

(15) "Mass transportation system" means any system which transports the general public by bus, rail, or any other means of conveyance moving along prescribed routes, except any railroad subject to the Federal Railway Labor Act, Title 45, U.S.C.A.

(16) "Person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers.

(17) "Representative" includes any person who is the duly authorized agent of a collective bargaining unit.

(18) "Secondary boycott" includes causing or threatening to cause, and combining or conspiring to cause or threaten to cause, injury to one not a party to the particular labor dispute, to aid which such boycott is initiated or continued, whether by:

(a) Withholding patronage, labor, or other beneficial business intercourse;

(b) Picketing;

(c) Refusing to handle, install, use, or work on particular materials, equipment, or supplies; or

(d) Any other unlawful means in order to bring him against his will into a concerted plan to coerce or inflict damage upon another or to compel the party with whom the labor dispute exists to comply with any particular demands.

8-3-105. Director to administer - commission to make rules and regulations therefor. (1) The director of the division shall enforce and administer the provisions of this article.

(2) The commission may adopt reasonable rules and regulations relative to the administration of this article and relative to the conduct of all elections and hearings pertaining to mass transportation as defined in section 8-3-104 (15). Such rules and regulations shall not be effective until ten days after the date thereof.

8-3-106. Rights of employees. In accordance with the provisions of this article, employees have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own free choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Each employee also has the right to refrain from any of such activities. The rights of each employee are essential rights, and nothing contained in this article shall be so construed as to infringe upon or have any operation against or in conflict with such rights.

8-3-107. Representatives and elections. (1) A unit chosen for the purpose of collective bargaining shall be the exclusive representative of all of the employees in such unit, if the majority of the employees of one employer, or the majority of the employees of one employer in a craft, vote at an election. But employees individually have the right at any time to present grievances to their employer in person or through representatives of their own free choosing, and the employer shall confer with them in relation thereto.

(2) When a question arises concerning the selection of a collective bargaining unit, it shall be determined by secret ballot, and the director, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employees in any craft, division, department, or plant as to the selection of the collective bargaining unit.

(3) When a question arises concerning the selection of a collective bargaining unit, the director shall determine the question thereof by taking a secret ballot of employees and certifying in writing the results thereof to the bargaining units involved and to their employer. There shall be included on any ballot for the selection of a bargaining unit the names or suitable description of each bargaining unit submitted to the director and claimed to be the appropriate unit by an employee or group of employees participating in the election; except that the director, in his discretion, may exclude from the ballot any bargaining unit which, at the time of the election, stands deprived of its rights under this article by reason of a prior adjudication of its having engaged in an unfair labor practice. The ballot shall be so prepared as to permit a vote against representation by any unit named on the ballot. The director's certification of the results of any election shall be conclusive as to the findings included therein, unless reviewed

in the manner provided by section 8-3-110(8) and (11), for review of orders of the director.

(4) Questions concerning the selection of collective bargaining units may be raised by petition of any employee or his employer or the representative of either of them. Where it appears by the petition that any emergency exists requiring prompt action, the director shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employees, if it appears to the director that sufficient reason therefor exists.

(5) The director shall investigate and determine which persons shall be qualified and entitled to vote at any election held by him and shall prepare and certify a poll list of such qualified voters and shall file the same in the office of the director not later than twenty-four nor earlier than forty-eight hours preceding the time of such balloting. The list shall be available to the collective bargaining units whose interests are involved in the election. On request of any employee, the list shall be prepared so as to show separately which employees are entitled to vote for general representation of the employees and which employees are entitled to vote separately for craft representation or representation of any one of several plants of a common employer. No person whose name is not so certified shall be entitled to vote at such election. The director shall protect the secrecy of the ballot and shall take all proper measures for the accurate counting thereof and shall certify the result thereof and immediately file such certificate in the records of the division and make the same available for the inspection of any person interested. The bargaining units so elected and certified shall be the respective representatives of

the employees so electing them and recognized as such under this article. The names of all persons voting at the election for the selection of a bargaining unit shall be certified to the division and filed in its records and shall constitute the voting roll for said bargaining unit for all purposes under this article. The name of any person leaving such employment shall be removed from the roll, except that any employee whose name appears on said voting roll may have his name withdrawn from said roll by notice in writing to the division.

8-3-108. What are unfair labor practices. (1) It is an unfair labor practice for an employer, individually or in concert with others to:

(a) Interfere with, restrain, or coerce his employees in the exercise of the rights guaranteed in section 8-3-106;

(b) Initiate, create, dominate, or interfere with the formation or administration of any labor organization or contribute financial support to it; except that an employer shall not be prohibited from reimbursing employees at their prevailing wage rate for time spent conferring with him, nor from cooperating with representatives of at least a majority of his employees in a collective bargaining unit, at their request, by permitting employee organizational activities on employer premises or the use of employer facilities where such activities or use create no additional expense to the employer;

(c) Encourage or discourage membership in any labor organization, employee agency, committee, association, or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in

a collective bargaining unit where three-quarters or more of his employees have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director. The director shall declare any such all-union agreement terminated whenever he finds that the labor organization involved unreasonably has refused to receive as a member any employee of such employer, and each such all-union agreement is made subject to this duty of the director. Any person interested may come before the director, as provided in section 8-3-110, and ask the performance of this duty.

(d) Refuse to bargain collectively with the representatives of his employees in any collective bargaining unit; except that where an employer with reasonable cause files with the division a petition requesting a determination as to bargaining unit representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been ceritifed to him by the director;

(e) Enter into an all-union agreement except in the manner provided in paragraph (c) of this subsection (1);

(f) Violate the terms of a collective bargaining agreement, including an agreement to accept an arbitration award;

(g) Refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination, after appeal, if any, of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer has accepted;

(h) Discharge or otherwise discriminate against an employee because he has filed charges or given information or testimony in good faith under the provisions of this article;

(i) Deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally and terminable at any time by the employee's giving at least thirty days' written notice of such termination;

(j) Employ any person to spy upon employees or their representatives respecting their exercise of any right created or approved by this article;

(k) Make, circulate, or cause to be circulated a blacklist as described in section 8-2-110;

(l) Commit any crime or misdemeanor in connection with any controversy as to employment relations;

(m) Require a potential employee to furnish preemployment application information regarding said applicant's record of civil or military disobedience, unless any such matters resulted in a plea of guilty or a conviction by a court of competent jurisdiction.

(2) It is an unfair labor practice for an employee, individually or in concert with others to:

(a) Coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 8-3-106, or to intimidate his family or any member thereof, picket his domicile, or injure the person or property of such employee or his family or of any member thereof;

(b) Coerce, intimidate, or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 8-3-106, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative;

(c) Violate the terms of a collective bargaining agreement, including an agreement to accept an arbitration award;

(d) Refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination, after appeal, if any, of any tribunal having competent jurisdiction of the same or whose jurisdiction the employees or their representatives accepted;

(e) Cooperate in engaging in, promoting, or inducing picketing, boycotting, or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike;

(f) Hinder or prevent, by mass picketing, threats, intimidation, force, or coercion of any kind, the pursuit of any lawful work or employment; or to obstruct or interfere with entrance to or egress from any place of employment; or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance;

(g) Engage in a secondary boycott, or to hinder or prevent, by threats, intimidation, force, coercion, or sabotage, the obtaining, use, or disposition of materials, equipment, or services, or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use, or disposition of materials, equipment, or services;

(h) Take, retain, or remain in unauthorized possession of property or any part thereof of the employer, or to engage in any concerted effort to interfere with production, except by leaving the premises in an orderly manner for the purpose of going on strike;

(i) Engage in a sit-down strike on the premises or property of the employer;

(j) Fail to give the notice of intention to strike provided in section 8-3-113;

(k) Commit any crime or misdemeanor in connection with any controversy as to employment relations;

(l) Demand or require any stand-in employee to be hired or employed by an employer, or to demand or require that the employer employ or pay for an employee to stand by or stand in for work being done by other employees, or to require the employer to employ or pay for any employee not required by the employer or necessary for the work of the employer;

(m) Do or cause to be done, on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subsections (1) and (2) of this section.

(3) It is an unfair labor practice for an employee, individually or in concert with others, or for a labor organization or any of its agents to:

(a) Induce or encourage the employees of an employer

to engage in a strike or concerted refusal in the course of their employment, or by any means to force or require an employer or any one or more employees to refrain from or prevent the use of any material, device, tool, or equipment intended or calculated to reduce the cost of the work;

(b) Require or force an employer to use any materials or do any work or render any service in connection with any task, job, work, or service as a condition of using any labor-saving device, equipment, tool, or instrument in the performance of such task, job, work, or service;

(c) Impose on any employee any fine, penalty, or forfeiture because such employee has used, is using, or has attempted to use a labor-saving device;

(d) (I) Engage in or induce or encourage employees of any employer to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service where an object thereof is forcing or requiring any employer to assign particular work to employees in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order of the director or certification determining the bargaining representative for employees performing such work; but nothing contained in this subsection (3) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer). Whenever a complaint is filed charging that any person or labor organization is engaged in the unfair labor practice defined in this paragraph (d), the director shall hear and determine the dispute concerning the assignment of work

out of which such complaint arises, unless within ten days the parties to the dispute provide evidence to the director that the dispute is properly adjusted, in which case the complaint shall be dismissed by the director.

(II) Upon the filing of a complaint under this paragraph (d), the director shall make a preliminary investigation, and, if he finds that there is reasonable cause that the complaint is true, he may issue an order directing that the employees or labor organization cease and desist from striking, picketing, or refusing to handle or work on goods pending a resolution by the director of the dispute out of which the complaint arises.

(III) Upon the failure or refusal of any person or labor organization against whom such order is issued to comply with this order or direction, the district court of the district wherein the strike, picketing, or refusal to handle or work on goods takes place may, upon application of the director, issue injunctive relief in the manner provided in the Colorado rules of civil procedure for courts of record in Colorado.

(e) With regard to the entirety of this subsection (3), the following shall apply: Such material, device, tool, or equipment is germane to the employees' craft and not injurious to the employees' health and safety or the public generally, and nothing in this subsection (3) shall negate the rights of an employer and a labor organization to bargain collectively pursuant to subsection (1)(d) of this section.

(4) It is an unfair labor practice to do or cause to be done, on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subsections (1), (2), and (3) of this section.

8-3-109. What are not unfair labor practices. (1) It is not an unfair labor practice for any employer to refuse to grant a closed shop or all-union agreement or to accede to any proposal therefor as provided in this article.

(2) The right of both employer and employee freely to express, declare, and publish their respective views and proposals concerning any labor relationship shall not be abrogated or limited by this article, nor shall the exercise of such right constitute an unfair labor practice. No strike shall be lawful unless it is authorized by a majority vote of the employees in the union involved taken by secret ballot such as is provided in this article.

8-3-110. Prevention of unfair labor practices. (1) Any controversy concerning unfair labor practices may be submitted to the division in the manner and with the effect provided in this article; but nothing in this article shall prevent the pursuit of equitable or legal relief in courts of competent jurisdiction, nor shall it be any ground for refusal of such relief that all of the administrative remedies provided in this article before the division have not been exhausted.

(2) Upon the filing with the division by any party in interest of a complaint in writing on a form provided by the division charging any person with having engaged in any specific unfair labor practice, the division shall mail a copy of such complaint to all persons so charged. Any other person claiming interest in the dispute or controversy, as an employer, an employee, or representative thereof, shall be made a party upon application. The director may bring in additional parties by service of a copy of the complaint. Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the dis-

cretion of the director at any time prior to the issuance of a final order based thereon. The persons so complained of have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the notice of hearing. The director shall fix a time for the hearing on such complaint, which shall not be less than ten nor more than forty days after the filing of such compaint. Notice shall be given to the complainant and to each party named in the pleadings by service on him personally or by mailing a copy thereof to him at his last known post office address at least ten days before such hearing. In case a party in interest is located without the state and has no known post office address within this state, a copy of the complaint and copies of all notices shall be filed in the office of the secretary of state and shall also be sent by registered mail to the last known post office address of such party. Such filing and mailing shall constitute sufficient service with the same force and effect as if served upon the party located within this state. Such hearing may be adjourned from time to time in the discretion of the director and hearings may be held at such places as the director designates. The director may initiate and file any such complaint of his own motion or at the request of any interested person. Should the director file such a complaint on request, he shall not disclose the name or interest of the person upon whose request the complaint is filed, if in his judgment such disclosure would tend to prejudice the interest of any person who may be affected by any order that the director may enter upon such complaint.

(3) The director has the power to issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by the Colorado rules of civil procedure, and all such depositions shall be taken upon commissions issued by the director. No person shall be excused from attending and

testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the director on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture under the laws of the state of Colorado. No individual shall be prosecuted or subjected to any penalty or forfeiture for any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before the director in obedience to a subpoena issued by him. An individual so testifying shall not be exempt from prosecution and punishment for perjury in the first degree committed in so testifying.

(4) Any person who willfully and unlawfully fails or neglects to appear or testify or to produce books, papers, and records as required, upon application to a district court, shall be ordered to appear before the director to testify or produce evidence if so ordered, and failure to obey such order of the court may be punished by the court as a contempt thereof.

(5) Each witness who appears before the director by his order or subpoena shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of record, which shall be audited and paid by the state in the same manner as other expenses are audited and paid, upon presentation of properly verified vouchers approved by the director and charged to the proper appropriation for the division.

(6) A complete record shall be kept of all proceedings had before the director, and all testimony and proceedings shall be taken down by the reporter appointed by the director. Such proceedings shall not be governed by the technical rules of evidence, but by such rules as are prescribed by the commission for administrative hearings.

(7) After the final hearing the director shall promptly make and file his findings of fact upon all of the issues involved in the controversy and his order which shall state his determination as to the rights of the parties. Pending the final determination of any controversy before him, the director, after hearing, may make interlocutory findings and orders, which may be enforced in the same manner as final orders. Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed; suspend his rights, immunities, privileges, or remedies granted or afforded by this article as the director may specify, but not more than one year; and require an employer to take such affirmative action, including reinstatement of employees with or without pay, as the director may deem proper. Any order may further require such person to make reports from time to time showing the extent to which he has complied with the order.

(8) The director may authorize a deputy or referee to take evidence and to make findings and report them to the director. Any party in interest who is dissatisfied with the findings or order of the director may file a written petition with the commission to review such findings or order, and the filing of such petition for review shall stay any such order of the director.

(9) The director, on his own motion, may set aside, modify, or change any of his findings or orders at any time within twenty days from the date thereof if he discovers any mistake therein or upon the ground of newly discovered evidence.

(10) If any party fails or neglects to obey an order of the director while the same is in effect, the director may file a

complaint in the district court of the county wherein such person resides or usually transacts business for the enforcement of such order for appropriate temporary relief or restraining order, and shall certify and file in the court the record in the proceedings, including all documents and papers on file in the matter, and pleadings and testimony upon which such order was entered, and the findings and order of the director. Upon the filing the director shall cause notice thereof to be served upon such party by mailing a copy to his last known post office address, and thereupon the court has jurisdiction of the proceedings and of the question determined therein. Said action may thereupon be brought on for hearing upon such order by the director serving ten days' written notice upon the respondent, subject, however, to the Colorado rules of civil procedure for a change of the place of trial or the calling in of another judge. Upon such hearing the court may confirm, modify, or set aside the order of the director and enter an appropriate decree. No objection that was not urged before the director shall be considered by the court unless the failure or neglect to urge such objection is excused because of extraordinary circumstances. The findings of fact made by the director, if supported by credible and competent evidence in the record, shall be conclusive. The court in its discretion may grant leave to adduce additional evidence before the court where such evidence appears to be material and reasonable cause is shown for failure to have adduced such evidence in the hearing before the director. The director may modify his findings as to facts, or make new findings by reason of such additional evidence, and he shall file such modified or new findings with the same effect as his original findings and shall file his recommendations, if any, for the modification or setting aside of his original order. The court's judgment and decree shall be final; except that the same shall be subject to appellate review as provided by law.

(11) Within thirty days from the date of the order of the commission reviewing an order of the director, as provided in subsection (8) of this section, any party aggrieved thereby may file a complaint in the district court for the county in which he or any party resides or transacts business for review of the decision and order of the commission, subject, however, to provisions of law for a change of the place of trial or the calling in of another judge. Where different parties in the same proceeding file complaints for review in two or more courts having proper jurisdiction, the jurisdiction of the court in which the first complaint was filed shall be exclusive, and the other complaints shall be transferred to it. Such complaints shall state the grounds upon which a review is sought and shall be served with the summons. Service upon the secretary of the commission or any member of the commission is deemed completed services on all parties, but there shall be left with the person so served as many copies of the summons and complaint as there are respondents, and the commission shall mail one copy to each respondent. If the court is satisfied that a party in interest has been prejudicied because of exceptional delay in the receipt of a copy of the order of the commission, it may extend the time another thirty days in which such action may be commenced. The commission, within ten days after the complaint is filed, shall file in said court the record in the proceedings, as provided in subsection (10) of this section. Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' written notice to the other. Upon such hearing the court may confirm, modify, or set aside the order of the commission and enter an appropriate decree. Except as specifically provided otherwise in this subsection (11), the proceedings shall be the same as provided for in subsection (10) of this section.

(12) In any proceedings for review of an order of the

commission, the court shall disregard any irregularity or error unless it affirmatively appears that the complaining party was prejudiced thereby.

(13) Commencement of proceedings under subsections (10) or (11) of this section, unless otherwise specifically ordered by the court, shall operate as a stay of the commission's order.

(14) Complaints filed under this section shall have preference over any ordinary civil case pending in the district court, and shall be heard expeditiously, and the district court shall always be deemed open for the trial thereof.

(15) Substantial compliance with the procedures of this article is sufficient to give effect to the orders of the commission, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.

(16) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

(17) The director also has the power by himself and on his own motion to initiate proceedings in the manner provided in this section. It is likewise the duty of the director to so initiate a proceeding in his own name whenever complaint is made to him by any party in interest if it appears to the director that the disclosure of the name of the complainant, either as an employee or group of employees or as an employer or agent or representative of the employer, would jeopardize the rights or interests or standing of any party in interest. The proceedings so initiated by the director shall be conducted in the same manner and have the same effect as provided for in this section.

(18) (a) The director has the power and it is his duty in carrying out the public policy of the state, either upon his own initiative or upon the complaint of any party in interest or any organization or persons representing any public interests, if there is picketing which in the opinion of the director might tend to lead to riots, disturbances, or assaults or disturb public peace or injure the property or persons of individuals, to limit the number of pickets that may be permitted; and to prescribe the distance from any plant, entrance, or exit where such picketing, including not only the number of persons picketing but also the manner or method thereof; and to prevent the use of weapons of any kind or threats or intimidation.

(b) Upon the failure or refusal of any person against who any such order or direction is issued to comply with such order or direction, the district court of the district wherein the picketing takes place or the violation occurs, upon application of the director, may issue injunctive relief in the manner provided in the Colorado rules of civil procedure for courts of record in Colorado.

8-3-111. Protection of employees when authority acquires certain operations. (1) Before any authority may acquire and operate any property of a privately or publicly owned mass transportation system, fair and equitable protective arrangements, as determined by the director, shall be made to insure certain rights of employees. Such protective arrangements shall include, without being limited to, such provisions as may be necessary to accomplish the following objectives:

(a) The preservation of existing rights, privileges, and benefits of employees under existing collective bargaining agreements between the mass transportation system and the employees thereof, including the continuation of all pension

rights and benefits of the employees and their beneficiaries;

(b) The continuation of all collective bargaining in any situation existing at the time of such acquisition and the assurance of employment of all the employees of such mass transportation system so acquired;

(c) The protection of all individual employees with respect to their employment, including priorities, seniorities, and right of advancement when in agreement with any existing collective bargaining agreement;

(d) Training and retraining programs of employees and managing personnel.

(2) The contract whereby an authority acquires any property of a privately or publicly owned mass transportation system shall specify with particularity, the terms and conditions of all the protective arrangements set forth in this section, including all other protective arrangements which may be added through collective bargaining or by direction of the director.

(3) The determination of the sufficiency of protective arrangements shall be made by the director in accordance with such rules and regulations as the commission may from time to time establish.

8-3-112. Arbitration. (1) Parties to a labor dispute may agree in writing to have the director act as arbitrator or to name arbitrators to arbitrate all or any part of such dispute, and thereupon the director shall have the power so to act. The director shall appoint as arbitrators only competent, impartial, and disinterested persons. Proceedings in any such arbitration shall be as provided by the rules of arbitration under the Colorado rules of civil procedure.

(2) All parties to any labor dispute when the employer is an authority shall submit to arbitration upon written order of the director when such written order is the result of the procedure set forth in section 8-3-111(3). Any order so given shall be subject to appeal within five days of the receipt of such order by either the employee's representative or the authority, who are parties in interest. Appeal of the order shall be made to the district court in the judicial district where the most substantial number of the employees concerned are employed. Such court shall either confirm, deny, amend, or continue the order within sixty days following the application for appeal. The results of any arbitration conducted in accordance with the procedure set forth in this article shall be binding upon all parties in interest with the right of appeal to any court of competent jurisdiction on the grounds that the director or arbitration board has been unfair, capricious, or unjust in its conduct, determinations, or award.

8-3-113. Mediation. (1) The director has power to appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon his own initiative or upon the request of one of the parties to the dispute. It is the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the director has any power of compulsion in mediation proceedings. The director shall provide necessary expenses and order reasonable compensation for such mediators as he may appoint.

(2) Where, as provided by this article, the exercise of the right to strike by the employees of any employer engaged in the state of Colorado in the production, harvesting, or initial processing, the latter after leaving the farm, of any farm or

dairy product produced in this state would tend to cause the destruction or serious deterioration of such product, the employees shall give to the division at least thirty day's notice of their intention to strike, and, in the case of employees in all other industries or occupations, at least twenty days' notice of their intention to strike. The division shall immediately notify the employer of the receipt of such notice. Upon receipt of such notice, the director shall take immediate steps to effect mediation, if possible. In the event of the failure of the efforts to mediate, the director shall endeavor to induce the parties to arbitrate the controversy. Any strike called or made effective before the expiration of twenty days from the date of such notice shall constitute an unfair labor practice.

(3) Where the exercise of the right to strike is desired by the employees of any authority, the employees or their representatives shall file with the division written notice of intent to strike not less than forty calendar days prior to the date contemplated for such strike. Within twenty days of the filing of the notice, the director shall enter an order allowing or denying the strike based on the grounds of whether or not such strike would interfere with the preservation of the public peace, health, and safety in accordance with rules and regulations of the commission. Any order denying a strike under this section shall include an order to arbitrate in accordance with section 8-3-112. Such arbitration shall be entered into not later than one hundred days from the filing of the notice of intent to strike. Immediately upon receipt of a notice of intent to strike, the director shall take steps to effect mediation, if possible. In the event of failure to mediate, the director shall endeavor to induce the parties to arbitrate the contrversy. Any strike before the expiration of forty days from the giving of notice of intent to strike or in violation of an order of the di-

rector, unless such order is changed on appeal or otherwise, shall constitute an unfair labor practice.

(4) The commission shall prescribe reasonable rules of procedure for mediation under this section.

8-3-114. Duties of the attorney general and district attorneys. Upon the request of the director or the commission, the attorney general or the district attorney of the county in which a proceeding is brought before the district court for the purpose of enforcing or reviewing an order of the director or the commission shall appear and act as counsel for the director or the commission in such proceeding and in any proceeding to review the action of the district court affirming, modifying, or reversing each other.

8-3-115. Employer and employee committees. The director, from time to time, may appoint joint, standing, or special committees composed in equal numbers of representatives of employees and employers. The director may refer to any such committee for its study and advice any matters concerning the relations of employers and employees or the operation of this article.

8-3-116. Interference with commission - director - officer of division. Any person who willfully assaults, resists, prevents, impedes, or interferes with any member of the commission, the director, or any officer, deputy, agent, or employee of the division, or any of its agencies in the performance of duties pursuant to this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

8-3-117. Existing contracts unaffected. Nothing in this article shall operate to arbrogate, annul, or modify any valid agreement respecting employment relations existing on or before April 1, 1943.

8-3-118. Jurisdiction to issue restraining orders or injunctions. (1) Except as otherwise provided in this article, no court has jurisdiction to issue in any case involving or growing out of a labor dispute any restraining order or temporary or permanent injunction which in specific or general terms prohibits any person from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment, regardless of any promise, undertaking, contract, or agreement to do such work or to remain in such employment;

(b) Becoming or remaining a member of any labor organization or any employer organization, regardless of any undertaking or promise as is described in section 8-3-119;

(c) Paying or giving to or withholding from any person any strike or unemployment benefits or insurance or other moneys or things of value;

(d) Aiding, by all lawful means, any person who is being proceeded against in, or is prosecuting any action or suit in, any court of this state;

(e) Giving publicity to and obtaining or communicating information regarding the existence of or the facts involved in any dispute, whether by advertising, speaking, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

(f) Ceasing as an organization to patronize any person with whom the organization has a labor dispute or requiring it to employ any person;

(g) Assembling peaceably to do or to organize to do any of the acts specified in this section or to promote lawful interests;

(h) Advising or notifying any person of an intention to do any of the acts specified in this section;

(i) Agreeing with other persons to do or not to do any of the acts specified in this section;

(j) Advising, urging, or inducing, without fraud, violence or threat thereof, others to do the acts specified in this section, regardless of any such undertaking or promise as is described in section 8-3-119;

(k) Doing in concert any acts specified in this section on the ground that the persons engaged therein constitute an unlawful combination or conspiracy.

8-3-119. Relations contrary to public policy. (1) The following is declared to be contrary to public policy and shall not afford any basis for the granting of legal or equitable relief by any court against a party to such undertaking or promise or against any other persons who may advise, urge, or induce, without fraud, violence, or threat thereof, either party thereto to act in disregard of the undertaking or promise: Every undertaking or promise made on or after April 1, 1943, whether written or oral, express or implied, between any employee or prospective employee and his employer, prospective employer, or any other individual, firm, company, association, or corporation, whereby:

(a) Either party thereto undertakes or promises to join or to remain a member of some specific labor organization or to join or remain a member of some specific employer organization or any employer organization; or

(b) Either party thereto undertakes or promises not to join or not to remain a member of some specific labor organization or of some specific employer organization or any employer organizations; or

(c) Either party thereto undertakes or promises that he will withdraw from an employment relation in the event that he joins or remains a member of some specific labor organization or any labor organization or of some specific employer organization or any employer organization.

8-3-120. Conflict of provisions. Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this article, this article shall prevail; except that, in any situation where the provisions of this article cannot be validly enforced, the provisions of such other statutes or laws shall apply.

8-3-11. Civil liability for damages. (1) Any person who suffers injury because of an unfair labor practice has a right of action, jointly and severally, against all persons participating in said practice for damages caused to the injured person thereby.

(2) If, in accordance with this article or otherwise, persons otherwise unwilling to do so are induced to violate contracts of employment or for services or materials, any person injured thereby shall be entitled to recover and have judgment therefor at law against the persons, jointly and severally, so inducing the violation of such obligations.

8-3-122. Penalty for violation. Any person, firm, or corporation who violates any of the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined for the first offense not less than fifty dollars nor more than one hundred dollars and for the second and subsequent offenses not less than one hundred dollars nor more than five hundred dollars, together with costs.

8-3-13. Nonapplicability of other statutes. The provisions of section 8-1-108, 8-1-120, 8-1-123, and 8-1-124 shall not apply to this article, but this article and the administration thereof are governed and controlled as to all matters contained in sections 8-1-108, 8-1-120, 8-1-123, and 8-1-124 by the special provisions of this article.

2. Text of Pertinent Provisions of Labor Management Relations Act of 1947, as amended.

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided,* That nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organzation (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other

members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

"REPRESENTATIVES AND ELECTIONS

"SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropirate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*. That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be contrued to prohibit the waiving of hearings by stipulation for the purpose of

a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a) (3), of a petition alleging the desire that such authority be rescinded the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

"(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

• • •

"(b) Nothing in this Act shall be construed as authoriz-

ing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

APPENDIX D

1. Notice of Appeal (July 19, 1976)

IN THE SUPREME COURT
OF THE
STATE OF COLORADO

NOS. 26651 & 26797

COMMUNICATIONS WORKERS OF AMERICA, an unincorporated labor association,	)	
Plaintiff-Appellant,	)	
v.	)	
WESTERN ELECTRIC COMPANY, INCORPORATED, a New York corporation, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado, ALBERT F. MANGAN, in his capacity as a member of the Industrial Commission of the State of Colorado, and KENNETH C. RUSSELL, in his capacity	)	NOTICE OF APPEAL

as a member of the Industrial Commission of Colorado, and THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado corporation.

Defendants-Appellees.

COMES NOW the above-captioned Plaintiff-Appellant, the Communications Workers of America [hereinafter, CWA], and gives notice that CWA hereby appeals to the United States Supreme Court from the final judgment of the Supreme Court of the State of Colorado affirming the judgment of the District Court in and for the City and County of Denver in the above-captioned matter. The judgment of the Supreme Court of the State of Colorado was entered on June 7, 1976 and modified on July 6, 1976.

This appeal is taken under 28 U.S.C. §1257(2).

Respectfully submitted,

LAW OFFICES OF JOHN W. McKENDREE

By s/John W. McKendree
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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing NOTICE OF APPEAL, by depositing same in the U.S. Mail, first class postage prepaid, this 19th day of July, 1976, addressed as follows:

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I further certify that I have mailed a true and correct copy of the foregoing NOTICE OF APPEAL, by depositing same in the U.S. mail, first class airmail postage prepaid, this 19th day of July, 1976 addressed as follows:

Rex H. Reed, Esq.
National Right to Work Legal
Defense Foundation, Inc.
8316 Arlington Blvd., Suite 600
Fairfax, VA 22030

s/John W. McKendree

2. Amended Notice of Appeal (September 9, 1976)

IN THE SUPREME COURT
OF THE
STATE OF COLORADO

NOS. 26651 & 26797

COMMUNICATIONS WORKERS OF AMERICA, an unincorporated labor association,

Plaintiff-Appellant,

v.

WESTERN ELECTRIC COMPANY, INCORPORATED, a New York corporation, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado, ALBERT F. MANGAN, in his capacity as a member of the Industrial Commission of the State of Colorado, and KENNETH C. RUSSELL, in his capacity as a member of the Industrial Commission of Colorado, and THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado corporation.

Defendants-Appellees.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

AMENDED NOTICE is hereby given that the Communications Workers of America, the Appellant above-captioned, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Colorado affirming the judgment of the District Court in and for the City and County of Denver in the above-captioned matter. The final judgment of the Colorado Supreme Court

was entered on July 7, 1976 pursuant to an opinion initially issued on June 7, 1976 and modified on July 6, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, by depositing same in the U.S. Mail, first class postage prepaid, this 9th day of September, 1976, addressed as follows:

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I further certify that I have mailed a true and correct copy of the foregoing AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, by depositing same in the U.S. Mail, first class airmail postage prepaid, this 9th day of Septemeber, 1976 addressed as follows:

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John W. McKendree

Supreme Court, U. S.
FILED
NOV 30 1976
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

Nos. 76-459
and 76-478

COMMUNICATION WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

vs

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, EXECUTIVE DIRECTOR, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, ALBERT F. MANGAN, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, AND KENNETH C. RUSSELL IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF COLORADO,

Defendants–Appellants

vs

WESTERN ELECTRIC COMPANY, INC., a NEW YORK CORPORATION AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS OR AFFIRM

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In the
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COMMUNICATION WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

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Defendants–Appellants

vs

WESTERN ELECTRIC COMPANY, INC., a NEW YORK CORPORATION AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR TO AFFIRM

Appellee, Western Electric Company, moves the Court to dismiss the appeals herein or, in the alternative, to affirm the Judgment of the Supreme Court of Colorado on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

INTRODUCTORY STATEMENT

The decision of the Colorado Supreme Court below has been appealed by two parties to the state litigation. Plaintiff-Appellant Communications Workers of America challenges in substance the totality of that ruling. The Colorado Department of Labor and Employment, Division of Labor; the Colorado Industrial Commission; and various officials of these stage agencies, co-Defendants through five (5) years of state litigation, appeal only one procedural aspect of the lower court's decision, an issue also raised by Appellant Communications Workers of America. Different case numbers and titles have been assigned (i.e., *Communication Workers of America v. Western Electric Company, Inc.*, et al., No. 76-459; and *Colorado Department of Labor and Employment et al. v. Western Electric Co., Inc.*, et al., No. 76-478). However, the Clerk of this Court has given oral permission that a single Motion to Dismiss or to Affirm can be filed to cover both appeals, and that Appellee need only file the forty (40) copies of that Motion required for a single appeal. In compliance with those instructions, this Motion to Dismiss or Affirm is presented as to both of the aforementioned appeals.

QUESTIONS PRESENTED FOR REVIEW

1. DOES § 14(b) OF THE LABOR MANAGEMENT RELATIONS ACT AUTHORIZE STATE REGULATION AS WELL AS STRICT PROHIBITION OF UNION SECURITY AGREEMENTS?

2. MAY THE STATE OF COLORADO REQUIRE STATE CERTIFICATION OF A COLLECTIVE BARGAINING UNIT FOR THE SOLE PURPOSE OF DEFINING THE APPROPRIATE UNIT IN WHICH TO CONDUCT AN "ALL-UNION REFERENDUM" FOR PURPOSES OF REGULATING UNION SECURITY AGREEMENTS PURSUANT TO THE AUTHORIZATION OF § 14(b) OF THE LABOR MANAGEMENT RELATIONS ACT?

SUPPLEMENTAL STATEMENT OF THE CASE

Appellee Western Electric adopts in substance the statements of the case found in the Jurisdictional Statements of Plaintiff-Appellant Communication Workers of America (CWA) and Defendant-Appellant Colorado Department of Labor and Employment, Division of Labor, but submits the following supplemental material to clarify the proceedings below.

The instant appeals arise from two Declaratory Judgment actions filed by CWA against Defendants The Mountain States Telephone and Telegraph Company (hereinafter Mountain Bell) and Western Electric Company. Joined as Defendants were the Colorado Department of Labor and Employment, Division of Labor; the Colorado Industrial Commission; and various officials of these state agencies (hereinafter referred to as Colorado Department of Labor). The two actions were subsequently consolidated for trial and tried on a Stipulated Record of Evidence. At issue was the validity of certain union security provisions contained in seven (7) collective bargaining agreements between CWA and the two employers. The actions arose directly from the refusal of the employers to discharge about 100 employees of the two companies who had ceased making payments to the union, for a variety of reasons, of union dues or an amount equivalent to union dues. The union requested their discharge solely for this reason. The employers' refusal to discharge was predicated on the grounds that the applicable union security provisions were unenforceable in Colorado due to the fact that no all-union referendum

had been conducted by the Colorado Department of Labor and Employment, pursuant to the requirements of C.R.S. 1973, §8-3-108(1)(c), in their respective units of affected employees. All of the contested union security clauses contained statements that they were not applicable where "inconsistent with the law of such state." (See Clauses Reproduced at 551 P.2d 1069-1973).

The Colorado Department of Labor and Employment, Division of Labor; the Colorado Industrial Commission; and various officials of these state agencies, were named originally as nominal party Defendants only because they were charged with the duty of administering the Colorado Labor Peace Act and particularly the all-union referendum procedure. However, the parties agreed early in the litigation that there would be no action before the Industrial Commission or by it to enforce the law. From that time on, the State of Colorado basically did not participate in the case not even appearing for oral arguments at the trial or appellate level. By memorandum to the Court of Appeals dated February 18, 1975, the Attorney General indicated to that court that the state would not participate because both the court and the Industrial Commission had concurrent jurisdiction over the matter, as provided by C.R.S. 1973, §8-3-110(1), and that no ruling was required by the state defendants since no proceedings had been instigated before their respective agencies.

The union's primary contentions at the trial level were three-fold: First, that the contested contract clauses were not all-union agreements within the meaning of the Colorado Labor Peace Act; second, that the all-union referendum provisions of the Labor Peace Act were unenforceable because the state could only prohibit, not regulate, union security devices pursuant to §14(b) of the Labor Management Relations Act (hereinafter LMRA); and third, that the provisions of the Colorado Labor Peace Act were not intended to cover employers or employees subject to the jurisdiction of the National Labor Relations Board (hereinafter NLRB). (CWA Opening Trial Brief at 8-20; Reply Brief at 6-34). It

was in reference to these issues, as defined by the original pleadings, that the parties entered a stipulation of justiciability. The trial court resolved all of these issues in favor of the Defendants, and an Appeal to the Colorado Supreme Court affirmed the lower court's resolution as to these questions. The Colorado Supreme Court's resolution of the first and third issues constituted a conclusive resolution, as they presented issues solely of state law. As such, the issues were properly excluded from the instant appeals. The regulation/prohibition question constitutes one of the two issues that are brought before this Court by Appellant CWA.

In the opinion of the Colorado District Court, there was significant treatment of the issue of Federal preemption, but solely in the context of whether the state was free to regulate as opposed to a strict prohibition of, union security devices under the authorization of §14(b). The second issue currently before the Court (i.e., state certification of a collective bargaining unit for purposes of the all-union referendum) raises the issue of Federal preemption in a different context. The issue was not raised at the initial trial court level, and as such was not encompassed by the original stipulation of justiciability.

In its Briefs to the Colorado Supreme Court, Appellant CWA contended, *for the first time*, that, if the trial court's construction of the Labor Peace Act were correct, then the entire Colorado regulatory procedure was invalid on the basis of irreconcilable conflict with the certification powers extended to the NLRB by §9 of the LMRA. This assertion was founded on the union's conclusion that, if the all-union referendum provisions of the state legislation did apply to employers subject to the jurisdiction of the NLRB, then the state certification procedure for defining a "collective bargaining unit," as that term is used in the state act, also applied. Such a construction of the legislation would require that the state first conduct a collective bargaining unit election (as provided for in C.R.S. 1973, §8-3-104(4)) within the group of employees to be affected by the contemplated union security clause so as to define the unit in which the

subsequent all-union referendum was to be conducted. CWA's contention was that §9 of the LMRA preempted the state's authority to so certify a unit, and that the procedure was therefore invalid. (Opening Brief of Appellant on Appeal from District Court, City and County of Denver, at 22-26). Without making a significant evaluation of the merits of the claim of Federal preemption, both Defendant employers responded to this contention by stating that the Colorado legislation did not require the initial collective bargaining unit election to be conducted in those units subject to the jurisdiction of the NLRB.

The Colorado Supreme Court resolved this aspect of the appeal by concluding that the state collective bargaining unit election was a condition precedent to the conducting of an all-union referendum even in those units subject to the jurisdiction of the NLRB, but that such authority was not preempted by the NLRB's certification powers under §9 of the LMRA. 551 P.2d at 1076. However, the court expressly qualified the extent of its holding by recognizing that the state certification was only for purposes of defining a unit for purposes of conducting an all-union referendum, and was not certification for the general purposes of collective bargaining. 551 P.2d at 1078-79. The state certification authorized was not to establish a representative status as collective bargaining agent for the unit, but only a procedural mechanism in accomplishing the state regulation of union security agreements.

Two appeals have been taken from the Colorado Supreme Court's final disposition of the case. Appellant CWA raises essentially two issues: (1) state authority to regulate union security agreements pursuant to §14(b), and (2) whether or not the state's authority to certify a collective bargaining unit for the limited purposes stated has been preempted by §9 of the LMRA. Appellant Colorado Department of Labor appeals only from that part of the decision below that authorized limited state certification of the collective bargaining unit (i.e., issue No. 2). This Motion to Dismiss or Affirm is addressed to both of these appeals.

REASONS FOR GRANTING THE MOTION TO DISMISS OR TO AFFIRM

I. PRIOR DECISIONS OF THIS COURT HAVE CONFIRMED THE AUTHORITY OF A STATE TO REGULATE OR PROHIBIT UNION SECURITY PROVISIONS PURSUANT TO THE AUTHORIZATION CONTAINED IN §14(b) OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, AS AMENDED, 29 USC §164(b); ACCORDINGLY, THAT ISSUE PRESENTS NO FEDERAL QUESTION OF A SUBSTANTIAL NATURE.

Appellant Communication Workers of America (CWA) based this appeal in part on the question of the validity of the Colorado statutory provision (C.R.S. 1973, §8-3-108(1)(c)) which requires the holding of an "all-union" referendum as a condition precedent to the enforcement of a union security provision. The decisions of this Court in *Algoma Plywood and Veneer Company v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949) and *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963), conclusively resolve any dispute as to the authority of the individual states to so regulate application of union security provisions, pursuant to the authorization of §14(b) of the Labor Management Relations Act, 29 USC §164(b). The principle is firmly established that *where an issue has been conclusively foreclosed by prior decisions of the Court, it does not present a "substantial Federal question" sufficient to invoke the court's appellate jurisdiction pursuant to 28 USC §1257(2).* Accordingly, *review of this issue is not only unwarranted, but precluded.*

The court was faced with *this specific issue* in *Algoma* in the context of the Wisconsin all-union referendum provision, virtually the exact counterpart of the contested Colorado provision.[1] In response to the argument that §14(b) only

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[1] The statutory provision involved in *Algoma* provided:

> It shall be an unfair labor practice for an employer . . . to encourage . . . membership in any labor organiza-

authorized state prohibition, not regulation, of union security agreements, the court noted:

> *It is argued, however, that the effect of this section is to displace State law which "regulates" but does not wholly "prohibit" agreements requiring membership in a labor organization as a condition of employment.* But if there could be any doubt that the language of the section means that the Act shall not be construed to

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[1] Continued
tion . . . by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where at least two-thirds of such employees voting . . . shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board.
336 U.S. at 303-304.

The contested Colorado statute imposes a similar requirement, differing only in the majority vote required for approval:

> It is an unfair labor practice for an employer, individually or in concert with others to:
>
> * * * * * * *
>
> (c) Encourage or discourage membership in any labor organization, employee agency, committee association, or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit where three-quarters or more of his employees have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director.
> C.R.S. 1973, §8-3-108.

> authorize any "application" of a union-security contract, such as discharging an employee, *which under the circumstances "is prohibited" by the State*, the legislative history of the section would dispel it. *See* S. Rep. No. 105, 80th Cong. 1st Sess. 5-7; H. Rep. No. 245, 80th Cong. 1st Sess. 9, 34, 40, 44; H.R. Conf. Rep. No. 510, 80th Cong. 1st Sess. 60; 93rd Cong. Rec. 3554, 3559, 4904, 6383-84, 6446; 94 Cong. Rec. 3613 (April 16, 1947); *Id.* at 3617-18; HR 3020, as reported, §13. (emphasis supplied).
> 336 U.S. at 313.

Quoting this passage verbatim, the principle was reaffirmed in *Schermerhorn*. 375 U.S. at 104. Indicative of the content of the legislative history upon which the court relied is the following passage from the House Conference Report on §14(b).

> "the United States expressly declares the subject of compulsory unionism one that States may regulate concurrently with the United States, notwithstanding that the State law limits compulsory unionism more drastically than does the Federal law."
> H. Rep. No. 510, 80th Cong., 1st Sess., p. 60.

In upholding the validity of the Colorado "all-union" referendum election in the decision below, the Colorado Supreme Court found the Court's decisions in *Algoma* and *Schermerhorn* to be controlling. Citing these two decisions the Court noted:

> C.W.A. contends that states, pursuant to §14(b), are allowed to "prohibit" but not to "regulate" union security agreements. No matter how this distinction may be interpreted, §14(b) does allow states to prohibit the "application" of union security agreements .... The provisions of section 80-4-6(1)(d) are an important incident of the state's power to prohibit the application of Union Security provisions such as the ones here in issue. That power has not been supplanted by federal law.
> 551 P.2d at 1079.

The effect of these prior decisions is controlling as to Appellant-CWA's entitlement to review of this portion of the state court's decision. Rule 16(1)(b) of the Supreme Court Rules, provides that a motion to dismiss an appeal can be founded on the premise that the issue does not present a "substantial Federal question." Both this Court and the lower Federal courts have repeatedly recognized that an issue does not present a substantial Federal question "if the claim is clearly foreclosed by prior Supreme Court decisions". Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction*, §3564. *Levering and Garrigues Company v. Morrin*, 289 U.S. 103 (1933); *California Water Service Company v. City of Redding*, 304 U.S. 252 (1938); *Ex parte Poresky*, 290 U.S. 30 (1933). In *Missouri Pacific Railroad Company v. Castle*, 224 U.S. 541 (1912), the court expressly recognized the appropriatness of application of the rule as to parties seeking the exercise of the court's appellate jurisdiction.

> Defendant in error moves to affirm the judgment under subdivision 5 of rule 6. The motion, we think, should prevail, since the questions urged upon our attention as a basis for a reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary.
>
> 224 U.S. at 544.

The principle was recently reaffirmed in *Hagans v. Lavine*, 415 U.S. 528 (1974), where the court noted:

> "[t]he question may be plainly unsubstantial, either because it is 'obviously without merit' *or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject* and leave no room for the inference that the question sought to be raised can be the subject of controversy.' (emphasis supplied).
>
> 415 U.S. at 537.

In spite of the discussions in *Algoma* and *Schermerhorn*, CWA urges the Court that the issue remains unresolved.

> Finally, all of the above raises the question of whether §14(b) permits any kind of "regulation" vis-a-vis union security provisions other than the enforcing of state statutory or constitutional provisions absolutely proscribing a particular form of union security.
>
> CWA Jurisdictional Statement at 33.

The union concedes that *Algoma* and *Schermerhorn* "indicate with clarity that a state may enforce such a provision" (CWA at 33), and yet appear to conclude that certain decisions of the National Labor Relations Board (NLRB), which they read to be in conflict with *Algoma*, could somehow qualify this Court's construction of the congressional enactment. There is little merit in such a contention even if Appellant's underlying premises are correct, *NLRB v. Waterman Steamship Corporation*, 309 U.S. 206 (1940), but the fact is that the NLRB has, since the decision in *Algoma*, recognized the validity of state regulation as well as prohibition of union security provisions. Admittedly, *prior* to the decision in *Algoma*, the Board's decisions in *Northland Greyhound Lines, Inc.*, 80 NLRB 288 (1948) and *Safeway Stores, Inc.*, 81 NLRB 387 (1949), held that state attempts to regulate union security provisions, as opposed to strict prohibition of such, were invalid, but the Board *reversed* its position in *Western Electric Company*, 84 NLRB 1019, 1949), relying expressly on *Algoma*. Sitting *en banc*, the Board was requested to hold a union shop authorization election for a certified bargaining unit that included employees in states that prohibited such clauses, states that regulated (Colorado and Wisconsin), and states that had no law relating to the issue. The Board did conclude that the appropriate unit for the election would only exclude employees in states that prohibited union security agreements, but expressly recognized that the results of the election could not authorize adoption of union security clauses in the regulatory states (i.e., Colorado and Wisconsin), until the employees in those states also approved such by the applicable percentage required in a state referendum election.

> "Contrary to the views of our dissenting colleagues, in our opinion, this result is not inconsistent with the

recent case of Algoma Plywood Co. v. Wisconsin Employment Relations Board, 69 S. Ct. [584], 1949 [16 LABOR CASES ¶65,013], where the Supreme Court held that the laws of Wisconsin regulating union security agreements had not been superseded by the National Labor Relations Act, as amended. *There is no necessary conflict, in our opinion, between that holding and the view which we adopt herein that the States and the Federal Government have concurrent jurisdiction to regulate the union shop, each being supreme in its own sphere.*

> *"It follows from this view that any certification which we may issue on the basis of the election directed below is to be construed as certifying only that federal requirements have been met by the petitioner for purposes of enforcing the National Labor Relations Act. The question of compliance by the petitioner with State Laws regulating the union shop is a question of State law to be determined by State authorities in a State proceeding."* (emphasis supplied)
>
> *Western Electric* at 1020.

Quoting this language from the decision in *Western Electric*, the Board in *Molders Union* (Malleable Iron Range Company), 150 NLRB 913 (1965), upheld the discharge of a non-union employee two (2) days after the union had won a union security referendum pursuant to the Wisconsin regulatory statute. The employee contended that the discharge was an unfair labor practice because the thirty (30) day grace period required in §8(a)(3) of the National Labor Relations Act had not expired, but the Board concluded that the employer's conduct must be evaluated in light of the state regulatory statute, which did not require such a grace period.

Obviously, the reliance Appellant CWA places on the NLRB decisions, the only authority for their assertion that the issue constitutes a substantial Federal question, is grossly misplaced. Their synopsis of the *Western Electric* decision (at 33) is correct as far as it goes, but misleading in that it does

not note the Board's qualification of the decision requiring further compliance with the state regulatory provisions. The synopsis of *Molders Union* is not only *misleading* but *actually inopposite* to the decision handed down by the Board. CWA contends that the case holds there was "no unfair labor practice when employee discharged pursuant to union security provisions *unlawful under state statute* which regulates union security provisions but does not absolutely prohibit such provisions." (emphasis supplied) (at 34), whereas the decision expressly concludes that "[I]n any event, since there is no provision in the Wisconsin Act for a grace period as is provided in the Federal Act, *it is clear that the Wisconsin Act was not violated when Garzynski was discharged for refusal to join the Union."Malleable Iron* at 915 (emphasis supplied). Although there was some question in the mind of the Board as to which body (the NLRB or the Wisconsin Employment Relations Board) would have had jurisdiction if the state statute had not been complied with, the decision conclusively recognizes that discharge without compliance with the state regulation would have been improper. Accordingly, CWA not only derives no support from these decisions, but they actually are in harmony with the interpretation of §14(b) advanced by Appellee and recognized by the Colorado Supreme Court and earlier decisions of this Court.

Accordingly, the Colorado Supreme Court's treatment of the validity of state regulation of union security provisions is in complete harmony with the decisions of this Court and the NLRB. Regardless of the merits of Appellants' attack on the "two election procedure" mandated by the Colorado Supreme Court, the regulation/prohibition issue raised by CWA *has been conclusively foreclosed by prior decisions.* Accordingly, the issue raised by this aspect of the instant appeal is so unsubstantial as not to require further argument. Should the Court note probable jurisdiction as to the validity of the "two election procedure" (see Discussion, *infra.*), arguments should be restricted to that specific issue, so as to avoid the necessity of further litigation of this aspect of the lower court's decision that is in complete accord with this Court's prior conclusive determinations.

II. THE QUESTION OF THE STATE'S AUTHORITY TO IMPOSE THE "TWO ELECTION PROCEDURE" MANDATED BY THE DECISION BELOW DOES NOT PROVIDE AN ISSUE SUFFICIENTLY "RIPE" SO AS TO CONSTITUTE A JUSTICIABLE CASE OR CONTROVERSY AT THIS POINT IN TIME.

Both Appellants attack the validity of the two election procedure mandated by the Colorado Supreme Court's interpretation of the Colorado Labor Peace Act. That element of the decision required that, prior to the holding of an all-union referendum election (the procedure approved in *Algoma*), the state division of labor must first certify the unit in which the referendum is to be held, by conducting an election to define the collective bargaining unit under the Colorado Act. C.R.S. 1973, §8-3-104(4). The decision of the Court expressly limited the scope of the state's certification to negotiation of union security clauses, realizing that the state could not usurp the NLRB's authority to certify for purposes of collective bargaining in general.

Irrespective of any merit raised by this issue, the question does not currently present a controversy sufficiently "ripe" as to warrant review. This Court has rigidly adhered to the principle that legislative authorization for the issuance of declaratory judgments has not abrogated the constitutional requirement of an actual case or controversy as embodied in Article III, Section 2 of the Constitution. *Aetna Life Insurance Company of Hartford, Connecticut v. Haworth*, 300 U.S. 227 (1937). Both the Colorado and Federal Declaratory Judgment Acts expressly so limit the Court's jurisdiction. 28 USCA §2201; C.R.S. 1973, §13-51-106.[2]

[2]For cases so construing the Colorado Declaratory Judgment Act, *see, American Federation of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944); *Farmers Elevator Company v. First National Bank* 176 Colo. 168, 489 P.2d 318 (1971); *Gabriel v. Board of Regents of University of Colorado*, 83 Colo. 582, 267 P. 407 (1928).

Though Appellants cite extensive case authority for the proposition that the contested procedure is directly in conflict with provisions of the national legislation and areas found to be exclusively reserved to the jurisdiction of the NLRB, no such finding has been made by federal courts. (See Discussion, Section III *infra*.) However, they contend in the alternative that application of the procedure will have such a disruptive effect on the conduct of orderly labor relations, and ultimately interstate commerce that the conclusion of Federal preemption is thereby mandated.[3] The very limited nature and purpose of the application of the two election procedure, as expressed by the court below, demonstrate that such an *evaluation at this stage is untimely* on the dual grounds that the controversy will not be "ripe" until the responsible state agency devises a procedure for implementing the Court's decisions so as to provide a specific factual context for evaluating the effects of the procedure, *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945), and so as to provide the opportunity to *avoid* a constitutional determination of Federal supremacy by state application of the process in a manner that avoids any possibility of Federal-state conflict. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). Legislative changes are also possible.

Appellants would have the Court determine the validity of this procedure in spite of the *numerous contingencies* the Court would have to resolve in reaching any Federal determination. This alone is sufficient to invoke the policies of judicial restraint embodied in the ripeness doctrine. *Electric Bond and Share Company v. S.E.C.*, 303 U.S. 419 (1938). Appellant Colorado Department of Labor concedes that in the past they have *not* applied this process of certification to any unit subject to the jurisdiction of the NLRB (Colorado Department of Labor Jurisdictional Statement at 7). Accordingly, they can only *speculate* as to the procedure that will be utilized and the resulting effects as to the particular units involved. Appellants cannot even state unequivocally that any unit ultimately certified by the state would cover different

[3]See CWA Jurisdictional Statement at 30, Note 5. See Colorado Department of Labor Jurisdictional Statement at 11.

Colorado employees than the comparable unit certified by the NLRB, but they speak only in terms of *hypothetical possibilities*. Indeed, even were the state to certify a different unit, it is necessary to speculate on the ultimate disruptive effect that such would have on labor relations and interstate commerce. Just as easily, it *could have none*. Though CWA would like to classify the procedure involved as being one of a "quintessentially representative" nature (CWA Jurisdictional Statement at 32), the procedure laid down by the Colorado Supreme Court is not in any respect definitive of a "representative nature," but is simply a procedural mechanism for regulating union security devices, *not collective bargaining*. The decision of the Colorado Supreme Court expressly recognized that state certification was only for the single and limited purpose of defining the scope of the state referendum election, and did not extend or presume any further collective bargaining authority. The general incidents of collective bargaining are still governed by the procedure of the National Labor Relations Act and the NLRB, regardless of any variance in state certification. Appellees and the Colorado Supreme Court agree. Accordingly, Appellants' fears of all or a portion of the Federally certified unit losing the "collective bargaining unit election" will only have the effect of precluding that Federally certified unit from negotiating any all-union agreements, the very power §14(b) was intended to extend to the states. *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963). If the procedure were truly of a "quintessentially representative" nature, it would also have the effect of conferring or denying full representative status and collective bargaining powers on some specified unit, as occurred in *Bethlehem Steel Company v. New York Labor Board*, 330 U.S. 767 (1947) and *LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board*, 336 U.S. 18 (1949). *Such is not the effect of the Colorado certification procedure*. Again, Appellants' concerns are nothing but *sheer speculation*.

This Court has expressly refused to review the decision of the Supreme Court of the State of Alabama in a declaratory judgment proceeding under a closely parallel fact situation, expressly on the basis of the "ripeness doctrine." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). In *McAdory*, plaintiffs had filed an action in the state courts for a declaratory judgment that certain provisions of the state labor code were invalid due to unconstitutionality, and alternatively, that they were preempted by the Supremacy Clause of the Constitution. The Alabama Supreme Court ruled in favor of the Act's validity. This Court originally granted certiorari, but ultimately dismissed the petition on the basis that the issues were not sufficiently ripe so as to provide for meaningful review, in spite of the Alabama Supreme Court's conclusion of the statute's validity. Specifically, the court noted the following as to Appellants' contention of preemption by the National Labor Relations Act:

> Each of the contentions which petitioners make with respect to the conflict of §§7 and 16 with the National Labor Relations Act could readily be adjudicated and disposed of in an adversary suit drawing in question their validity as applied to specific states of fact, in which respondents could both challenge the facts and the applicability to them of the statute. In the present suit we find that both the uncertainty as to the construction of the sections and the uncertainty as to the facts to which they are to be applied preclude the adjudication which the petitioners seek.
>
> 325 U.S. at 467.

* * * * * * *

It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts. In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the

> needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes.
>
> 325 U.S. at 471.

This result was in accord with the reasoning of Justice Douglas in *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740.

> Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress.
>
> 315 U.S. at 746.

Relying on the reasoning of *McAdory*, the principle was reaffirmed in *Public Service Company of Utah v. Wycoff*, 344 U.S. 237 (1952). In that decision, the court held it would be inappropriate to grant injunctive or declaratory relief against the state's attempted regulation of an interstate carrier, at least until such time as the state's regulatory statute had been applied in a specific factual sitting.

> Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. *We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected.* Alabama State Federation of Labor v. McAdory, 325 US 450, 89 L ed 1725, 65 S Ct 1384. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. (emphasis supplied)
>
> 344 U.S. at 247.

Finally, such an application of the ripeness doctrine was reaffirmed in *Wheeler v. Barrera*, 417 U.S. 402 (1974). In that decision, the court refused to decide the question of whether or not the application of Federal funds to include aid to parochial schools mandated by the circuit court's decision, would violate the First Amendment establishment clause, on the basis that the issue would not be "ripe" for review until the defendant board of education had devised a specific plan to implement the circuit court's mandate, so as to avoid a decision on a hypothetical state of facts. 417 U.S. at 426-427.

Both Appellants urge this Court that its prior decisions in *Bethlehem Steel* and *LaCrosse* are supportive of their assertion of preemption. Regardless of the relevance of these decisions to the particular procedure involved under the Colorado Labor Peace Act, both of these decisions demonstrate the obstacle to the instant appeal created by the "ripeness" doctrine. Such recognition is implicit in *Bethlehem Steel*, where the employer did not challenge the state legislation until subsequent to the state board's actual certification of the unit pursuant to the state authorization. In *LaCrosse*, the state board had certified a union rival to the one recognized by the employer, as the collective bargaining representative for his employees. In response to the contention that the state certification was just an intermediate step in the administrative process, and that there was no binding application of the state power until an actual unfair labor practice proceeding was initiated to enforce the certification, Justice Douglas expressly recognized the need for a specific factual setting before an evaluation such as the present Appellants' request can be made legitimately.

> If that contention is correct, the case is of course not ripe for the intervention of the federal judicial power.
>
> 336 U.S. at 21.

The conjectural nature of the determinations Appellants request this Court to make concerning the validity of the "two election procedure" demonstrates the appropriateness for application of the "ripeness doctrine." The fact that, though the lower court did expressly pass on this issue, the

question was not raised by CWA until the case got to the Colorado Supreme Court; was not even litigated below by the "Colorado Department of Labor"; and was not litigated on the merits by Appellees Western Electric and Mountain Bell based upon their construction that the statute did not require an initial collective bargaining unit election, further militates against review at this stage. Appellee therefore respectfully requests that the Court defer any determination as to the substantiality of the questions presented on the basis of nonjusticiability.

III. SINCE THE TWO ELECTION PROCEDURE MANDATED BY THE DECISION BELOW IS WITHIN THE SCOPE OF STATE AUTHORITY EXTENDED BY 29 USC §164(b), THE VALIDITY OF THAT PROCEDURE DOES NOT THEREBY RAISE A FEDERAL QUESTION OF A SUBSTANTIAL NATURE.

Independent of questions of justiciability, the validity of the "two election procedure" also fails to present the Court with a substantial Federal question. Appellants cite a dirge of authorities for the proposition that the "two election procedure" exceeds the scope of state authority under §14(b), but these authorities at best only tangentially touch upon the issue raised. This Court has on occasion had to determine the parameters of state power in asserting the authority granted by §14(b), but never in the context that the Colorado Labor Peace Act established as to state certification of a collective bargaining unit. The limited purposes of this certification do not exceed the scope of authority extended to the state pursuant to §14(b), hence application of the procedure is a permissible function of state authority over union security provisions, and as such, presents no Federal question of a substantial nature for the Court's resolution.

The issue is greatly obscured by the various decisions to which Appellants direct the Court's attention in support of their contention of preemption, while failing to put them in perspective with the fact situation presently before the Court. The proper point from which to initiate an evaluation of this

issue is the Court's explicit recognition in *Algoma* that §14(b) was included in the Act "to forestall the inference that Federal policy was exclusive in the matter of union security." 336 U.S. at 314. Recognizing the limited scope of §14(b), the Colorado Supreme Court in the decision below made explicit that, as to employees subject to the jurisdiction of the National Labor Relations Board, the state certification of a collective bargaining unit applied only for purposes of negotiating and executing an "all-union agreement," or participating in an "all-union referendum", state activities clearly authorized by §14(b). 551 P.2d at 1079. *See, Algoma, supra,* and *Schermerhorn, supra.*

Appellants reliance on this Court's decision in *Bethlehem Steel Company v. New York Labor Board,* 330 U.S. 767 (1947) and *LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board,* 336 U.S. 18 (1949), is misplaced, as neither of these decisions provide meaningful criteria for evaluating the Colorado two election procedure. In both of these decisions, the state had attempted to certify a collective bargaining unit for *all purposes* of collective bargaining. The Court's concern in each of these cases, and a consideration leading to a conclusion of Federal preemption, was the inevitable incompatibility of the dual regulation *of the same activities,* activities that the Federal legislation recognized to be areas of paramount Federal concern.

> Thus, if both laws are upheld, two administrative bodies are asserting a discretional control *over the same subject matter,* . . . . (emphasis supplied)
> 300 U.S. at 775.

Further reliance is placed on the dicta in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955), that the Federal provisions for certification of collective bargaining representatives carried with it "implications of exclusiveness." 348 U.S. at 476. Western Electric does not question the validity of any of these decisions, but recognizes that the present controversy does *not* involve the issue of certification *for purposes of obtaining representative status,* so that the cited precedent is of little, if any, value. State certification solely for the

purpose of delimiting the appropriate unit for purposes of conducting a state all-union referendum, as authorized by §14(b) and *Algoma* and *Schermerhorn*, is not analogous, or even comparative, to state certification for the purpose of establishing collective bargaining representative status. The present controversy simply does not involve the issue of representation as that term is normally used in labor law. There is no conflict between the two competing authorities, state and federal. Thus, the court in *Weber* expressly recognized that policies mandating the result in that decision were not present in those areas where the jurisdiction of the NLRB was not exclusive. 348 U.S. at 477. *See, Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942); *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

When put in context, it becomes apparent that the Court has not heretofore evaluated a procedure such as that presently in controversy. *Schermerhorn* recognized that *the scope of state authority under §14(b) would have to be determined on a case by case basis.*

> As a result of §14(b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union-security field.
>
> 375 U.S. at 106.

Schermerhorn did establish that "state power, recognized by §14(b), begins only with actual negotiation and execution of the type of agreement described by §14(b), 375 U.S. at 105, but the court recognized that the conducting of a state mandated all-union referendum, prior to execution of a union security clause, was well within the scope of the term "negotiation." *Algoma, supra.* The Colorado modification of the Wisconsin referendum procedure does not sufficiently alter the nature of this process so as to withdraw it from the negotiation stage. Indeed, the Colorado collective bargaining unit election would appear to be an integral step in negotiations, as resort to such a procedure would not be made if the intention did not exist to execute a union security agreement.

The Court's recent decision in *Oil, Chemical and Atomic Workers v. Mobil Oil Corporation*, 44 U.S.L.W. 4842 (U.S. 1976), *supports* the reading given by the court below as to the scope of §14(b). Appellant CWA asserts a somewhat tortured reading of this decision.

> Mobil Oil reinforces the notion that §14(b) was not concerned with any aspect of the collective bargaining relationship between an employer and a labor organization until such time an employee is sought to be discharged pursuant to a union security provision.
>
> CWA Jurisdictional Statement at 28-29.[4]

To the contrary, as applicable to the instant appeal, the essence of the decision in *Mobil Oil* was:

> Since §8(a)(3) already prohibits the closed shop, the more restrictive policies that §14(b) allows the States to enact relate not to the hiring process but rather to conditions that would come into effect only after an individual is hired. It is evident, then, that §14(b)'s primary concern is with state regulation of the post-hiring employer-employee-union relationship.
>
> 44 USLW at 4845.

Obviously, the Colorado two election procedure applies only to the "post-hiring employer-employee-union relationship." The court also reaffirmed the principle adhered to since *Algoma* and *Schermerhorn* as to the broad scope of state authority when exercised within the confines of §14(b).

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[4] This obviously is irreconcilable with the Court's endorsement of the Wisconsin all-union referendum procedure in *Algoma* and is asserted in spite of the fact that the court in *Mobil Oil* cites *Algoma* extensively for the principle that:

> . . . §14(b) was designed to make clear that §8(a)(3) left the States free to pursue "their own more restrictive policies in the matter of union-security agreements."
>
> 44 USLW at 4845.

> We have recognized that with respect to those state laws which § 14(b) permits to be exempted from § 8(a) (3)'s national policy "[t]here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws . . ." Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). The question here of course is whether Texas' contacts with this employment relationship are adequate to call into play § 14(b)'s mandated deference to state law.
>
> 44 USLW at 4845.

In evaluating for general purposes those areas left to state regulation after enactment of the National Labor Relations Act, the court noted in *San Diego Unions v. Garmon*, 359 U.S. 236 (1959), that the legislature did not withdraw from the state "power to regulate where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act." 359 U.S. at 243. Under varying circumstances this court has upheld the state's power to act, even though state authorization was not expressly recognized by the national legislation. *See, Automobile Workers v. Russell*, 356 U.S. 634 (1958); *Machinists v. Gonzales*, 356 U.S. 617 (1958); *Hanna Mining Company v. Marine Engineers*, 382 U.S. 181 (1965); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). The state activity embodied in the Colorado "two election procedure," incident to authority expressly granted to the state under § 14(b), is clearly of such a peripheral nature when evaluated solely within the limited scope authorized by the decision below.

Moreover, evaluation of the general guidelines laid down for application of the Colorado procedure indicates that the activity is well within a state's § 14(b) powers, so long as actual application will not eventually prove to have a disruptive effect on the conduct of harmonious labor relations. Appellant CWA expresses concern over the court's statement in *Schermerhorn* that:

> state power, recognized by § 14(b) begins only with the actual negotiation and execution of the type of agreement described by § 14(b).
>
> 375 U.S. at 105.

However, the decision below recognized this limitation and noted that the Colorado procedure (i.e., the collective bargaining unit election and the subsequent all-union referendum) would be initiated only *after* the clause had been originally negotiated by the federally certified bargaining representative.

> State power, pursuant to § 14(b), begins with the actual negotiation and execution of the type of agreement described by § 4(b). Retail Clerks Local 1625 v. Schermerhorn, supra. Negotiation and execution of the contested agreements between C.W.A. and Mountain States and between C.W.A. and Western Electric has occurred, and thus the state's power under § 14(b) has become operative.
>
> 551 P.2d at 1078.

This particular procedure demonstrates the harmonious nature and the essential interplay of the proper functioning of both authorities (i.e., the NLRB and Colorado Department of Labor) certification functions. The Board's original certification and the established bargaining representative's negotiation of a collective bargaining agreement containing a union security provision will give rise to the necessity of the conduct, by the Colorado Industrial Commission, of two elections, as required by the Labor Peace Act. Appellant CWA appears particularly concerned with the possibility of the state collective bargaining unit election resulting in a different representative being certified by the state election.[5] The insignificance of this concern is obvious, for, as the opinion below made clear, the state's certification is only for purposes of entering into a binding union security provision. 551 P.2d at 1079. CWA's conclusion in Note 22, Page 27, that "[M]oreover, because each "collective bargaining unit" can designate its own 'representative,' it would appear possible for a minority union to be so designated", is entirely *unsupported* by the decision below. The court expressly noted that the *state certification was only for purposes of negotiating a union security clause as part* of the *overall* collective bargaining *agreement*.

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[5] See CWA Jurisdictional Statement at 27, Note 22.

> . . . the procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit the application of union security agreements under the permissive grant of authority contained in §14(b) of the Taft-Hartley Act. The application of section 80-4-2(6) to the union security provisions of the Colorado Labor Peace Act is severable from its application in other contexts of the Act.
>
> 551 P.2d 1065.

It would seem apparent that, even assuming *arguendo* a rival representative could be designated in this election, it would be of no value to represent a unit for purposes of negotiating a union security clause, when there is no authority to represent the unit for any other purposes of collective bargaining. Western Electric doubts that the division of labor would implement the election requirement in such a manner. Such is clearly not required by the decision of the Colorado Supreme Court, and further demonstrates the speculative nature of the entire controversy.

Western Electric concedes that the procedure which the Colorado Supreme Court required under the Colorado Labor Peace Act may seem cumbersome judged in a vacuum, but the problems presented are ones particularly appropriate for resolution by state authorities, and they have had *no opportunity yet to act*. The Department of Labor concedes in their Jurisdictional Statement that:

> Finally, and most critically, the state will be obligated to conduct elections to redetermine units already recognized or certified by the National Labor Relations Board. This election process will cost the state large sums of money, will create additional administrative burdens, and may invalidate contract provision concerning union security for which a referendum was held, but no Colorado unit election was conducted.
>
> Colorado Department of Labor Jurisdictional Statement at 11-12.

These obviously are not concerns properly brought to this forum and were never raised anywhere below. Unless enforcement of the procedure should prove disruptive (a determination impossible to make at this stage), the process is totally limited to accomplishment of the state objectives authorized by §14(b), and exercised within the parameters of that legislation. Indeed, the fact that many of the NLRB certified units encompass employees of a *multi-state* area mandates some delimitation of the unit by the state prior to the conducting of an all-union referendum, and *Appellants' construction* of the scope of §14(b) would appear to invalidate *any* method of defining the appropriate unit for an *intra-state* referendum, which is all Colorado lawfully can require. *Algoma* conclusively refutes any such proposition. Implicit in *Algoma* is the recognition that the state, in exercising its regulatory powers over a Federally certified multi-state bargaining unit, must of necessity re-define that bargaining unit, as state authority can only be exerted over employees working within the state. The decision below only serves to define the method by which this is accomplished. Accordingly, the issue raised is essentially one of state law and does not raise a Federal question. Even if the initial determination of whether or not this is a matter of state law constitutes a Federal question, the preceding discussion indicates that the Federal question presented is not of a substantial nature.

CONCLUSION

WHEREFORE, Appellee Western Electric respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the Judgment entered in the cause by the Supreme Court of Colorado.

Respectfully submitted,

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Supreme Court, U. S.
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In the Supreme Court of the United States

Nos. 76-459
and 76-476

COMMUNICATION WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

vs

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, EXECUTIVE DIRECTOR, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, ALBERT F. MANGAN, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, AND KENNETH C. RUSSELL IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF COLORADO,

Defendants-Appellants

vs

WESTERN ELECTRIC COMPANY, INC., A NEW YORK CORPORATION AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

Nos. 76-459 and 76-478

COMMUNICATION WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

vs

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, EXECUTIVE DIRECTOR, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, ALBERT F. MANGAN, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, AND KENNETH C. RUSSELL IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF COLORADO,

Defendants–Appellants

vs

WESTERN ELECTRIC COMPANY, INC., a NEW YORK CORPORATION AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the Appellee, The Mountain States Telephone and Telegraph Company moves this Court to dismiss the appeals herein or, in the alternative, to affirm the judgment of the Supreme Court of Colorado on the ground that the requested appeals do not present substantial federal questions. The issues presented by the appeals have already been decided by this Court.

INTRODUCTORY STATEMENT

A decision of the Colorado Supreme Court has been separately appealed by two parties. Plaintiff-Appellant Communications Workers of America, hereinafter C. W. A., challenges the totality of the decision. State Agency Defendant-Appellants appeal one procedural aspect of the decision. Different case numbers were assigned to the two appeals. This Motion to Dismiss or Affirm pertains to both appeals.

SUPPLEMENTAL STATEMENT OF THE CASE

Appellee, The Mountain States Telephone and Telegraph Company, adopts in substance the statements of the case found in the jurisdictional statements of both Appellants. A supplemental statement will, in the opinion of the Appellee, nonetheless, clarify the proceedings. The sole issue presented to the Colorado Supreme Court was the validity of union security provisions contained in collective bargaining agreements between Plaintiff C. W. A. and two Defendant employers. The action arose directly from the refusal of the employers to discharge employees who had ceased making payments of union dues, or an amount equivalent to union dues, to local units of C. W. A. in Colorado. The refusal to discharge was premised on the ground that the union security provisions were unenforceable in Colorado since the union had not complied with the referendum requirements of the

Colorado Labor Peace Act, Section 8-3-108(1) (c) (CRS 1973.)[1]

The Colorado Department of Labor and Employment, Division of Labor, the Colorado Industrial Commission, and various officials of these agencies charged with the administration of the Colorado Labor Peace Act were nominal party defendants. These Defendants did not actively participate. Through the Attorney General of the State of Colorado, they indicated that the Colorado courts had concurrent jurisdiction and were free to proceed with a determination without prior exhaustion of administrative remedies pursuant to Section 8-3-110(1) (CRS 1973).[2]

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[1] 8-3-108(1) (c) (C.R.S. 1973)

> Encourage or discourage membership in any labor organization, employee agency, committee, association, or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit where three-quarters or more of his employees have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director. The director shall declare any such all-union agreement terminated whenever he finds that the labor organization involved unreasonably has refused to receive as a member any employee of such employer, and each such all-union agreement is made subject to this duty of the director. Any person interested may come before the director, as provided in section 8-3-110, and ask the performance of this duty.

[2] 8-3-110(1) (C.R.S. 1973)

> Any controversy concerning unfair labor practices may be submitted to the division in the manner and with the effect provided in this article; but nothing in this article shall prevent the pursuit of equitable or legal relief in courts of competent jurisdiction, nor shall it be any ground for refusal of such relief that all of the administrative remedies provided in this article before the division have not been exhausted.

Both Appellants argue that the resulting decision of the Colorado Supreme Court has created irreconcilable conflict with the certifications powers extended to the National Labor Relations Board by Section 9 of the National Labor Relations Act, 29 USC §159. Both Appellants premise their contention on the fact that the Colorado Labor Peace Act was construed by the Colorado Supreme Court to require a determination of a "collective bargaining unit," as defined by Section 8-3-104(4) (CRS 1973),[3] prior to the all-union referendum election. The Colorado Supreme Court, however, specifically and expressly held that the determination of a "collective bargaining unit" was for the purpose of conducting the referendum election and was not certification for the general purposes of collective bargaining. It does not establish a representative bargaining agent for purposes of negotiating wages, hours and terms and conditions of employment. According to the Colorado Supreme Court, this determination constitutes only a procedure in state regulation of union security "severable from its application in other contexts of the Act." *Communications Workers of America vs. Western Electric Company, Inc., et. al.*, 551 P2d 1065, 1079 (Colo. 1976). The Colorado Supreme Court decision does not in any way pertain to the issue of representation as that term is generally understood in labor law. Indeed, the Colorado Supreme Court recognized that its regulatory procedure,

[3] 8-3-104(4) (C.R.S. 1973)

> "Collective bargaining unit" means an organization selected by secret ballot, as provided in section 8-3-107, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such unit, except that, where a majority of such employees engaged in a single craft, division, department, or plant have voted by secret ballot that the employees of such single craft, division, department, or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or where a majority of the employees in each separate unit have voted to do so by secret ballot, as provided in section 8-3-107.

including the "collective bargaining unit" election and the subsequent all union referendum, would occur only after a union security clause had been actually negotiated by a certified or recognized bargaining representative under federal law. 551 P2d 1065 at 1078.

ARGUMENT IN SUPPORT OF GRANTING THE MOTION TO DISMISS

1. THE QUESTION OF COLORADO'S AUTHORITY TO REGULATE UNION SECURITY BY IMPOSING A "TWO ELECTION" PROCEDURE DOES NOT PRESENT AN ISSUE SUFFICIENTLY "RIPE" FOR REVIEW.

Defendant-Appellant State of Colorado argues that a substantial federal question exists because the Colorado Supreme Court's decision "conflicts with the consistent administrative interpretation which the state has given to the Colorado Labor Peace Act since its inception" (Jurisdictional Statement page 7). Arguing that certification of the state "collective bargaining unit" is inconsistent with the federal regulatory scheme, the state observes that "finally, and most critically, the state will be obligated to conduct elections to redetermine units already recognized or certified by the National Labor Relations Board. This election process will cost the state large sums of money, will create additional administrative burdens, and may invalidate contract provision concerning union security for which a referendum was held, but no Colorado unit election was conducted." (Jurisdictional Statement pages 11 and 12.) Appellee, The Mountain States Telephone and Telegraph Company, respectfully suggests that matters of state expense, and state administrative convenience do not rise to the level of substantial federal questions, and submits that there is nothing in the opinion of the Colorado Supreme Court to suggest that the state must conduct elections to redetermine units already recognized or certified by the National Labor Relations Board. This is totally speculative. The Colorado Labor Peace Act itself defines an "election" to include those conducted "by any tribunal having competent jurisdiction or whose jurisdiction has been

accepted by the parties." Section 8-3-104 (10) (CRS 1973).[4] This certainly contemplates an NLRB election and certification.

The argument of the state appears to be that the state agencies will administer the law so as to bring it into conflict with the federal constitution or an act of Congress. This is not only hypothetical but is specifically at odds with the law of Colorado generally and with specific provisions of the Colorado Labor Peace Act. The Colorado Labor Peace Act specifically provides that where there is a conflict of provisions that "in any situation where the provisions of this Article (Colorado Labor Peace Act) cannot be validly enforced, the provisions of such other statutes or laws shall apply." Section 8-3-120 (CRS 1973).[5] In addition, Section 2-4-201 (CRS 1973)[6] specifically provides that the Colorado

[4] 8-3-104(10) (C.R.S. 1973)

"Election" means a proceeding in which the employees authorized by this article cast a secret ballot to select a collective bargaining unit or for any other purpose specified in this article, including elections conducted by the division of labor or by any tribunal having competent jurisdiction or whose jurisdiction has been accepted by the parties.

[5] 8-3-120 (C.R.S. 1973)

Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this article, this article shall prevail; except that, in any situation where the provisions of this article cannot be validly enforced, the provisions of such other statutes or laws shall apply.

[6] 2-4-201 (C.R.S. 1973)

(1) In enacting a statute, it is presumed that:

(a) Compliance with the constitutions of the state of Colorado and the United States is intended;

(b) The entire statute is intended to be effective;

(c) A just and reasonable result is intended;

(d) A result feasible of execution is intended;

(e) Public interest is favored over any private interest.

General Assembly in enacting a statute is to be presumed to have intended "compliance with the constitutions of the State of Colorado and the United States. . ."

It is suggested that the arguments of the State Appellants are hypothetical, do not establish specific legal relationships, and are not presently ripe for review. Absent an assumption that Colorado will administer its law so as to create actual conflict with an Act of Congress, the case presents no specific factual context for evaluating these arguments. This alone should suggest judicial restraint over a constitutional determination of Federal supremacy until actual Federal-State conflict exists. See, for example, *Alabama State Federation of Labor vs. McAdory*, 325 U.S. 450 (1945); *Rescue Army vs. Municipal Court*, 331 U.S. 549 (1947); *Electric Bond and Share Company vs. Securities and Exchange Commission*, 303 U.S. 419 (1938); *Public Service Co. of Utah vs. Wycoff*, 344 U.S. 237 (1952); and *Wheeler vs. Barrera*, 417 U.S. 402 (1974).

Cases relied upon by both Appellants note the impropriety of ruling on an appeal where, as here, additional administrative actions, including the determination of the bargaining unit, holding an election on the union referendum, and potentially an unfair labor practice proceeding with subsequent judicial review, must occur before specific legal rights and relationships of the parties to this action are finally established. In *LaCrosse Telephone Corp. vs. Wisconsin Employment Relations Board*, 336 U.S. 18 (1949), the state agency actually certified a collective bargaining unit to bargain with an employer over wages, hours and terms and conditions of employment. The Wisconsin Supreme Court sustained the state certification as against the argument that it created a conflict with election provisions of the National Labor Relations Act. Unlike the present situation, the state certified union in the *LaCrosse* case was certified to bargain for purposes of wages, hours and terms of conditions of employment. In addition, unlike the present case, the State Court decision was final with respect to the specific legal relationship between the employer and its union and no additional administrative steps were necessary. And finally, unlike the

present situation, there was no specific statutory grant of authority to the State whereas, in the present situation, §14(b) of the National Labor Relations Act, 29 U.S.C., §164(b), has ceded to the states the authority to regulate union security. As to the need for this "conclusive" determination of rights as opposed to an "abstract determination of status," the Court noted that an interim adjudication in an uncompleted administrative process which did not establish legal rights and relationships would result in a case which was "not ripe for the intervention of the Federal judicial power" *Id.* at 21. The other case relied upon by Appellants, *Bethlehem Steel Company vs. New York State Labor Relations Board*, 330 U.S. 767 (1947), involved the constitutionality of a State act which purported to allow unionization of supervisors. The case preceded the Taft-Hartley amendments concerning non-recognition of supervisory units. The New York State Court upheld the constitutionality of its act based upon the assumption that Federal law is not exclusive until the power is actually exercised. This Court noted that the Congressional intent to exclude state action could be implied from the pervasive nature of Federal labor legislation. The cast is distinguishable in two respects. First, unlike the situation in *Bethlehem Steel*, Congress has specifically provided the states authority to regulate union security through 14(b) of the National Labor Relations Act, 29 U.S.C. §164(b). Secondly, unlike the *Bethlehem Steel* case, the situations presented to the Court had not previously been litigated; whereas, in the present case, this Court has spoken at great length to the very issues raised by Appellants.

The Plaintiff-Appellant C.W.A. argues that the Colorado Supreme Court decision raises a substantial Federal question concerning the scope of §14(b) of the National Labor Relations Act, 29 U.S.C. §164(b). Their argument is that "the Colorado Supreme Court's decision herein constitutes a far broader construction of §14(b) than accorded under any decision of this Court interpreting such provision" (Jurisdictional Statements at 23). Although not specifically so subdivided, the argument appears to be that §14(b) of the National Labor Relations Act, 29 U.S.C. §164(b), does not permit a state to *REGULATE* union security but only to

"absolutely prescribe such provisions" (Jurisdictional Statement at 34).

Secondly, C.W.A. appears to argue that the Colorado Supreme Court's interpretation of §14(b) of the National Labor Relations Act, 29 U.S.C. §164(b), raises the question of whether a state may regulate the negotiation of a union security clause (Jurisdictional Statement at 29). And finally, C.W.A. appears to argue that Congress did not intend §14(b) to have application to "employers and labor organizations in interstate commerce" (Jurisdictional Statement at page 3).

The Appellee, The Mountain States Telephone and Telegraph Company, respectfully submits that all of these issues have been previously decided by this Court.

2. THE APPEALS PRESENT NO SUBSTANTIAL FEDERAL QUESTION SINCE THIS COURT HAS PREVIOUSLY DETERMINED THAT §14(b) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §164(b), MAY BE APPLIED TO EMPLOYERS ENGAGED IN INDUSTRIES AFFECTING COMMERCE.

It is settled beyond all rational argument to the contrary that Federal law controls the vast majority of employer-employee relationships. Absent a specific grant of authority by Congress, states may not apply their statutes to the labor-management activities of any business enterprise in or affecting interstate commerce. It is equally clear that a potential for conflict is adequate to bring the doctrines of preemption into play. See *San Diego Building Trades Council vs. Garmon*, 359 U.S. 236 (1959). Nonetheless if Plaintiff-Appellant's argument that §14(b) cannot constitutionally be applied to any employer whose activity affects commerce, the provision has no meaning. It is a nullity and Congress wasted its time and effort in its enactment. If §14(b) has any meaning whatsoever, it has to be that the state law may be extended in this one area to employers whose operations affect commerce.

3. THE APPEALS PRESENT NO SUBSTANTIAL FEDERAL QUESTION SINCE PRIOR DECISIONS OF THIS COURT HAVE CONFIRMED THE AUTHORITY OF THE STATE TO REGULATE AND PROHIBIT UNION SECURITY PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS.

The appellate jurisdiction of this Court cannot be invoked by raising an issue which has been conclusively foreclosed by prior Supreme Court decisions. *Zucht vs. King*, 260 U.S. 174 (1922); *Levering and Garrigues Company vs. Morrin*, 289 U.S. 103 (1933); *California Water Service Company vs. City of Redding*, 304 U.S. 252 (1938); *Ex parte Poresky*, 290 U.S. 30 (1933); and *Missouri Pacific Railroad Company vs. Castle*, 224 U.S. 541 (1912). The principle was recently reaffirmed in *Hagans vs. Lavine*, 415 U.S. 528 (1974), where the court noted:

> "[t]he question may be plainly unsubstantial, either because it is 'obviously without merit' *or because 'its soundness so clearly results from the previous decisions of this court as to foreclose the subject* and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" (emphasis supplied).
> 415 U.S. at 537.

Such issues do not raise substantial Federal questions, and accordingly constitute a sufficient basis for the Court to dismiss the appeal, or affirm the decision below without further argument, as authorized by Rule 16(1)(b), Revised Rules of the United States Supreme Court.

The specific issue of state authority to regulate, as opposed to an absolute prohibition of union security devices pursuant to the authorization of §14(b) of the National Labor Relations Act, 29 U.S.C. §164(b), was conclusively resolved in *Algoma Plywood and Veneer Company vs. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949). As in Colorado, the Wisconsin statute did not prohibit union security clauses but rather regulated such clauses as

"all-union" agreements applicable to all employees of the employer *if* affirmatively sanctioned by three-quarters of such employees in a state-conducted referendum. The contract provision in question was a maintenance of membership clause under which an employee was dismissed for failure to pay dues. Initially, the United States Supreme Court held that there was no preemption of state activity by virtue of §8(3), 29 U.S.C. §158(3) of the original Wagner Act and rejected the employer's contention that Wisconsin could not forbid what federal law affirmatively allowed. This Court stated:

> "The short answer is that §8(3) merely disclaims a national policy hostile to the closed shop *or* other forms of union-security agreement." *Id.* at 307

Addressing itself then to the changes wrought by the Taft-Hartley amendments, this Court concluded that:

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because §8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, §14(b) was included to forestall the inference that federal policy was to be exclusive. *Id.* at 313-314.

Citing legislative history at length, this Court further disposed of the argument that §14(b) preempts state law which "regulates" but does not wholly "prohibit" union security agreements. It disposed of this argument by saying that any limitation on the "application" of union security agreements was proper by a state under §14(b).

> *It is argued, however, that the effect of this section is to displace State law which "regulates" but does not wholly "prohibit" agreements requiring membership in a labor organization as a condition of employment.* But if there could be any doubt that the language of the

section means that the Act shall not be construed to authorize any "application" of a union-security contract, such as discharging an employee, *which under the circumstances "is prohibited" by - the state,* the legislative history of the section would dispel it. *See* S. Rep. No. 105, 80th Cong. 1st Sess. 5-7; H. Rep. No. 245, 80th Cong. 1st Sess. 9, 34, 40, 44; H.R. Conf. Rep. No. 510, 80th Cong. 1st Sess. 60; 93rd Cong. Rec. 3554, 3559, 4904, 6383-84, 3617-18; HR 3020, as reported, §13. (emphasis supplied).
336 U.S. at 313.

The following quote from the House Conference Report on §14(b) shows what Congress intended.

> "the United States expressly declares the subject of compulsory unionism one that States may regulate concurrently with the United States, notwithstanding that the State law limits compulsory unionism more drastically than does the Federal law." H. Rep. No. 510, 80th Cong., 1st. Sess., p. 60.

The Rule was reaffirmed *Retail Clerks Inter. Ass'n. vs. Schermerhorn,* 375 U.S. 96 (1963). This Court held that state courts rather than the NLRB had jurisdiction to enforce the straight prohibition against the "actual negotiation and execution of the type of agreement described by Sec. 14(b)." *Id.* at 105. The court's rationale is clear and succinct:

> "Yet even if the union security agreement clears all federal hurdles, the state by reason of §14(b) have the final say and may outlaw it.
>
> There is thus conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements." *Id.* at 102, 103.

This Court's final observation was that Congress "chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application of

agreements authorized by §14(b) and decided to suffer a medley of attitudes and philosophies on the subject." *Id.* at 104, 105.

The vitality and viability of §14(b) and other exemptions to federal preemption is dramatized by reference to *Amalgamated Ass'n. of St. E.R. & M.C. Emp. vs. Lockridge,* 403 U.S. 274 (1970) which contains the following discussion of the myriad exemptions to preemption:

> "Even though federal law is pervasive in labor-management relations, state law is preserved in some respects .... the simple fact that Congress and this Court have deferred to the States in these areas indicates a subordination of the interest in uniformity to the interests of the States. By making the matter one of the state law, Congress has not only authorized multiformity on the subject, but practically guaranteed it. The results, as far as uniformity is concerned, are no different than if the States applied federal law with abandon. For example, the controversial §14(b) of NLRA, has authorized States to choose for themselves whether to require or permit union shops. This allows the state to *regulate* union or agency shop clauses, [citations omitted] so that union insistence on a security agreement as part of a collective bargaining agreement may be prohibited in one State and protected or even encouraged in another. The policy choice made by Congress on this matter necessarily subordinated uniformity in national law to what were perceived to be overriding concerns of the States." *Id.* at 317, 318. [citations omitted and emphasis added]

While this quote is from a dissent, it should be noted that it was essentially the opinion of four Justices.

The Colorado Supreme Court found this Court's decisions in *Algoma* and *Schermerhorn* to be controlling. Citing these decisions the Colorado Court noted:

> C.W.A. contends that states, pursuant to §14(b), are allowed to "prohibit" but not to "regulate" union

> security agreements. No matter how this distinction may be interpreted, §14(b) does allow states to prohibit the "application" of union security agreements. .... The provisions of Section 80-4-6(1)(d) are an important incident of the state's power to prohibit the application of union security provisions such as the ones here in issue. That power has not been supplanted by federal law.
> 551 P.2d at 1079

In spite of the discussions in *Algoma* and *Schermerhorn*, and the Colorado Supreme Court's reliance upon them, CWA continues to urge that the issue remains unresolved, arguing some conflict with decisions of the National Labor Relations Board (NLRB). (CWA Jurisdictional Statement at 33-34) However, the Board's decision in *Western Electric*, 84 NLRB 1019 (1949), and *Molders Union* (Malleable Iron Range Company), 150 NLRB 913 (1965), demonstrate that the Board both recognizes and adheres to the principles of *Algoma*. In *Western Electric*, the Board noted that:

> "Contrary to the views of our dissenting colleagues, in our opinion, this result is not inconsistent with the recent case of Algoma Plywood Co. vs. Wisconsin Employment Relations Board, 69 S. Ct. [584], 1949 [16 LABOR CASES ¶65,013], where the Supreme Court held that the laws of Wisconsin regulating union security agreements had not been superseded by the National Labor Relations Act, as amended. *There is no necessary conflict, in our opinion, between that holding and the view which we adopt herein that the States and the Federal Government have concurrent jurisdiction to regulate the union shop, each being supreme in its own sphere.*
>
> *"It follows from this view that any certification which we may issue on the basis of the election directed below is to be construed as certifying only that federal requirements have been met by the Petitioner with State Laws regulating the union shop is a question of State law to be determined by State authorities in a State proceeding."* (emphasis supplied)
> *Western Electric* at 1020.

It is respectfully suggested that Plaintiff-Appellant's reliance on any Administrative Agency decisions at odds with a decision of this Court is misplaced.

4. THE "TWO ELECTION" PROCEDURE FALLS WITHIN THE SCOPE OF AUTHORITY EXTENDED TO THE STATES BY §14(b) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §164(b), AND THUS RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Both Appellants challenge the validity of the "two election" procedure mandated by the Colorado Supreme Court's interpretation of the Colorado Labor Peace Act. This attack is on the basis that §9 of the Labor Management Relations Act has preempted state authority to conduct the initial "collective bargaining unit" election required by §8-3-104(4) (CRS 1973). (CWA Jurisdictional Statement at 28-33, Colorado Department of Labor Jurisdictional Statement at 7-12). To the contrary, the Colorado procedure falls well within the scope of §14(b), 29 U.S.C. §164(b), and therefore constitutes a valid exercise of state power raising no substantial Federal question since it rests upon adequate and independent state grounds.

Herb vs. Pitcairn, 324 U.S. 117 (1945); *Williams vs. Georgia*, 349 U.S. 374 (1955); *Wolfe vs. North Carolina*, 364 U.S. 177 (1960); and *Paschall vs. Christie-Stewart, Inc.*, 414 U.S. 100 (1973).

This Court in *Algoma, supra*, recognized that the enactment of §14(b), 29 U.S.C. §164(b), was intended "to forestall the inference that Federal policy was exclusive in the matter of union security." 336 U.S. at 314. Within the framework of union security, the states are free to pursue their own policies even though they are more restrictive than that embodied in the Federal legislation. Though Appellants would attempt to expand the extent of the Colorado Supreme Court's holding so as to actually bring it in conflict with the NLRB's certification functions under §9 of the LMRA, 29

U.S.C. §159, the Court's requirement of a state conducted "collective bargaining unit" election was expressly limited to purposes of effecting the state regulation of union security devices, and was not in the nature of state certification for general purposes of collective bargaining. The Colorado Supreme Court noted:

> We need not speculate on the question of whether Colorado's procedures for establishing a collective bargaining unit are preempted by federal law in any context other than the one here in issue. We concern ourselves with the certification procedure only as it relates to the state's power to regulate union security clauses in collective bargaining agreements. 551 P.2d at 1078.

Algoma and *Schermerhorn* established the validity of state regulation, and the Colorado requirement for an initial state certification of a unit, solely for the purpose of conducting the all-union referendum, does not have the effect of removing the procedure from the scope of §14(b), 29 U.S.C. §164(b). The authorities cited by Appellant do not invalidate such regulation. The Colorado Supreme Court recognized the restrictions of these decisions, and framed its opinion within these guidelines. Colorado is not attempting to certify for general purposes of representation, but only for purposes of negotiation of union security provisions, 551 P.2d at 1078. The Colorado procedure is directly analogous to state activities upheld under §14(b), 29 U.S.C. §164(b), such as in *Algoma* and *Schermerhorn, supra,* and other areas where the NLRB's jurisdiction has not been found to be exclusive. *See, Allen-Bradley Local vs. Wisconsin Employment Relations Board,* 315 U.S. 740 (1942); *International Union vs. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949).

This Court's recent decision in *Oil, Chemical and Atomic Workers vs. Mobil Oil Corporation,* 96 S. Ct. 2140, 44 U.S.L.W. 4842 (U.S. 1976), supports the Appellees understanding of the scope of §14(b), 29 U.S.C. §164(b):

> Since §8(a) (3) already prohibits the closed shop, the more restrictive policies that §14(b) allows the States to enact relate not to the hiring process but rather to conditions that would come into effect only after an individual is hired. It is evident, then, that §14(b)'s primary concern is with state regulation of the post-hiring employer-employee-union relationship. . . . We have recognized that with respect to those state laws which §14(b) permits to be exempted from §8(a) (3)'s national policy "[t]here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws. . ." Retail Clerks vs. Schermerhorn, 375 U.S. 96, 103 (1963). The question here of course is whether Texas' contacts with this employment relationship are adequate to call into play §14(b)'s mandated deference to state law.
> 44 USLW at 4845, 96 S. Ct. at 2146

This Court also noted in *San Diego Unions vs. Garmon,* 359 U.S. 236 (1959), that the Congress did not withdraw from the state "power to regulate where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act." 359 U.S. at 243. This Court has also upheld the state's power to act, even where state authorization was not as expressly recognized by Congress. *See, Automobile Workers vs. Russell,* 356 U.S. 634 (1958); *Machinists vs. Gonzales,* 356 U.S. 617 (1958); *Hanna Mining Company vs. Marine Engineers,* 382 U.S. 181 (1965); *Linn vs. Plant Guard Workers,* 383 U.S. 53 (1966). The state activity embodied in the Colorado "two election procedure," is incident to authority expressly granted to the state under §14(b), 29 U.S.C. §164(b). As such, the decision rests upon an adequate and independent state ground. As stated in *Herb vs. Pitcairn,* 324 U.S. 117 (1945) the

> "Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."
> *Id.* at 125.

Accordingly, this issue, as raised by both Appellants, fails to raise a Federal question of a substantial nature, and does not warrant the exercise of this Court's appellate jurisdiction.

CONCLUSION

WHEREFORE, Appellee, The Mountain States Telephone and Telegraph Company, respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the Judgment entered by the Supreme Court of Colorado.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 30th day of November, 1976, three (3) copies each of the foregoing Motion to Dismiss or Affirm of the Defendant-Appellee, The Mountain States Telephone and Telegraph Company, were deposited in the United States Mail, postage prepaid, addressed as follows:

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Supreme Court, U. S.
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No. 76-459

In the Supreme Court of the United States

OCTOBER TERM, 1976

COMMUNICATIONS WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

v.

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, EXECUTIVE DIRECTOR, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, ALBERT F. MANGAN, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, AND KENNETH C. RUSSELL IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO,

Defendants-Appellants,

v.

WESTERN ELECTRIC COMPANY, INC., A NEW YORK CORPORATION, AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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No. 76-459

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OCTOBER TERM, 1976

COMMUNICATIONS WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

v.

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, EXECUTIVE DIRECTOR, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, ALBERT F. MANGAN, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, AND KENNETH C. RUSSELL IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO,

Defendants-Appellants,

v.

WESTERN ELECTRIC COMPANY, INC., A NEW YORK CORPORATION, AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

The Appellant, Communications Workers of America [hereinafter, CWA], respectfully submits the following Brief

in Opposition to Motions to Dismiss or Affirm filed herein by Appellees The Mountain States Telephone and Telegraph Company [hereinafter, Mountain States] and Western Electric Company, Inc. [hereinafter, Western Electric].[1]

ARGUMENT

Mountain States' and Western Electric's Motions to Dismiss or Affirm are substantially identical in their arguments and reasoning.[2] In sum, Mountain States and Western Electric argue that the issues presented in CWA's Jurisdictional Statement are not "ripe" for review and that such issues, even if ripe for review, do not present a substantial federal question. CWA submits that both of these contentions are manifestly without merit.

I. THE ISSUES PRESENTED IN CWA'S JURISDICTIONAL STATEMENT ARE RIPE FOR REVIEW BECAUSE THE WITHIN APPEAL IS FROM A FINAL JUDGMENT OF THE COLORADO SUPREME COURT DECLARING INVALID AND UNENFORCEABLE IN COLORADO THE UNION SECURITY PROVISIONS AT ISSUE.

Mountain States' and Western Electric's arguments concerning the ripeness of the Colorado Supreme Court's decision

[1]A separate appeal in this matter has been filed by the several State of Colorado Defendants, and No. 76-478 has been assigned to that appeal. The within Brief in Opposition to Motions to Dismiss or Affirm pertains only to Mountain States' and Western Electric's Motions to Dismiss or Affirm as such Motions relate to No. 76-459.

[2]Mountain States' Motion to Dismiss or Affirm shall, in abbreviated form, be referred to as "M.S. Motion;" Western Electric's Motion to Dismiss or Affirm shall, in abbreviated form, be referred to as "W.E. Motion." CWA's Jurisdictional Statement shall, in abbreviated form, be referred to as "CWA Jur. St." References to the Appendix herein shall be to CWA's Appendix to Jurisdictional Statement.

herein for review focus on CWA's and the State of Colorado's concern that such decision will result in substantial fragmentation of federally recognized bargaining units for the purpose of entering into "all-union agreements" and participating in "all-union" referenda. Thus, Western Electric states that "[t]he very limited nature and purpose of the application of the two election procedure, as expressed by the court below, demonstrate that such an *evaluation at this stage is untimely* on the dual grounds that the controversy will not be 'ripe' until the responsible state agency devises a procedure for implementing the Court's decision so as to provide a specific factual context for evaluating the effects of the procedure, . . . and so as to provide the opportunity to *avoid* a constitutional determination of Federal supremacy by staying application of the process in a manner that avoids any possibility of Federal-State conflict." [W.E. Motion at 15; emphasis in original]; see also, M.S. Motion at 7. CWA suggests that such an analysis misapprehends both the Colorado Supreme Court's reasoning and the legal effect of its holding.

The Colorado Supreme Court has held herein that the union security provisions in seven distinct collective bargaining agreements are unenforceable because of 1973 C.R.S. §8-3-108(1)(c).[3] Specifically, the Colorado Supreme Court held:

> "All of the bargaining units involved in this appeal have been recognized or certified by the National Labor Relations Board, and no evidence suggests that any of them were established by a secret ballot election pursuant to §[8-3-104(4)]. In our view, a secret ballot election, as described by §[8-3-104(4)], is the exclusive method by which a collective bargaining unit subject to the 'all-union'

[3]All references to the Colorado Revised Statutes shall be to Colorado Revised Statutes 1973.

referendum provisions of §[8-3-108(1)(c)] may be recognized. Correlatively, we hold that a collective bargaining unit, as defined by §[8-3-104(4)], is a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law. Inasmuch as no secret ballot election was conducted for the purpose of establishing a collective bargaining unit authorized to enter into an all-union agreement with Mountain States and Western Electric, C.W.A. is not entitled to the enforcement of the all-union agreement provisions which are, in our opinion, invalid. Even if such an election had been held and an appropriately authorized collective bargaining unit had been established, the union security provisions here in issue would be invalid and unenforceable because of the lack of employee approval through an all-union referendum. [App. B at 23]

• • •

A valid all-union agreement may only be entered after the establishment of a collective bargaining unit in accordance with §[8-3-104(4)]. Having failed to properly define such collective bargaining units prior to entering the agreements here in issue, C.W.A. cannot properly demand that the employers enforce these invalid agreements. [App. B at 29]

• • •

Accordingly, we hold that the disputed clauses of the collective bargaining agreements, between C.W.A. and Mountain States and between C.W.A. and Western Electric are union security clauses subject to state control under the Colorado Labor Peace Act. As enacted, the clauses were invalid because they were not approved through an all-union referendum by an appropriately designated employee group. C.W.A. may not rely on these

clauses to effectuate a discharge of an employee refusing to comply with the terms thereof. Mountain States and Western Electric lawfully refused C.W.A.'s demand that the employees be discharged." [App. B at 31]

Therefore, if any single aspect of this controversy is clear, it is that the union security provisions at issue may not, at this time, be lawfully enforced in the State of Colorado. It is equally clear from the above that the reason for such unenforceability is CWA's failure (1) to have "collective bargaining units" appropriately designated pursuant to §8-3-104(4) *prior* to entering into the union security provisions at issue and (2) to have "all-union" referenda conducted in such "collective bargaining units" pursuant to §8-3-108(1)(c). Further, it cannot be denied that the Colorado Supreme Court's decision herein definitively determined the rights and liabilities of CWA, Mountain States and Western Electric vis-a-vis the union security provisions at issue. Such is the purpose of a declaratory judgment under Colorado law, and such judgment is final in nature.[4]

The federal questions arising from the Colorado Supreme Court's decision are carefully catalogued in CWA's Jurisdictional Statement.[5] CWA's challenge to the validity of §8-3-108(1)(c) is based on its contention that (1) it is unconstitutional for the State of Colorado to require all or a portion of a federally recognized bargaining unit to constitute itself as a "collective bargaining unit" as a condition precedent to the right to enter into a valid union security provision; (2) it is unconstitutional for the State of Colorado to require all or a portion of a federally recognized bargaining unit to constitute

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[4]See, §13-51-104; Colo.R.Civ.P. 57(a); App. B at 4. If declaratory relief will not terminate the controversy, a Colorado court may refuse to enter a declaratory judgment. See, §13-51-111; Colo.R.Civ.P.57(f).
[5]CWA Jur. St. at 3-4.

itself as a "collective bargaining unit" as a condition precedent to the conduct of an "all-union" referendum; and (3) it is unconstitutional for the State of Colorado to require the conduct of an "all-union" referendum as a condition precedent to the enforcement of a union security provision. *None* of these issues involves controverted issues of fact, and *none* of these issues turns on subsequent administrative proceedings. Moreover, the requirements for a valid union security provision under the Colorado Labor Peace Act [hereinafter, Labor Peace Act], as construed by the Colorado Supreme Court, are not "hypothetical" or "speculative." These requirements are, rather, clear and unmistakable.[6]

Mountain States' and Western Electric's authority for their "ripeness" position is, on its face, totally inapposite. The instant appeal neither deals with a state statute either wholly or partially unconstrued[7] nor involves a hypothetical question of law.[8] Nor is the instant appeal from proceedings in which legal rights and relationships have not finally been established. Accord, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242

[6]As noted above, Mountain States' and Western Electric's "ripeness" argument is based upon their contention that fears concerning the fragmentation of federally recognized bargaining units through "collective bargaining unit" determinations are, presently, mere speculation. While CWA believes, as does the State of Colorado, such fragmentation is inevitable under the Labor Peace Act, even if, *arguendo*, fragmentation were not possible, the necessity of "collective bargaining unit" status and the necessity of an "all-union" referendum remain as conditions precedent to an enforceable union security provision. These latter requirements are, of course, the focus of CWA's appeal.

[7]Compare, *Alabama State Fed. of Labor v. McAdory*, 325 U.S. 450, 459-60 (1945); *Rescue Army v. Municipal Court*, 331 U.S. 549, 573-74 (1947).

[8]Compare, *Alabama State Fed. of Labor v. McAdory*, *supra* at 460, 462-63, 465-66, 467-69; *Electric Bond & Share Co. v. Securities & Exch. Comm'n*, 303 U.S. 419, 443 (1938); *Allen-Bradley Local 1111 v. Wisconsin Emp. Rel. Bd.*, 315 U.S. 740, 746-47 (1942); *Public Service Comm'n v. Wycoff Co., Inc.*, 344 U.S. 237, 242-45 (1952); *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974).

(1937); *LaCrosse Tel. Corp. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 18, 24 (1949). CWA submits, therefore, that Mountain States' and Western Electric's "ripeness" contentions are utterly without merit.[9]

II. THE QUESTIONS PRESENTED FOR REVIEW BY CWA ARE OF A SUBSTANTIAL FEDERAL NATURE AND WARRANT PLENARY REVIEW BY THE COURT.

CWA will not repeat the analysis contained in its Jurisdictional Statement of the substantial nature of the federal questions herein. It will, however, address certain contentions of Mountain States and Western Electric in this regard.

Mountain States apparently concedes that a "collective bargaining unit" election is a condition precedent to the right to enter into a valid union security agreement in Colorado. See, M.S. Motion at 16. Western Electric, in contrast, states that the only purpose of "collective bargaining unit" certification is to delimit the appropriate unit in which to conduct an "all-union" referendum. See, W.E. Motion at 6, 22. Western Electric also states that "collective bargaining unit" certification would be effected prior to execution of a collective bar-

[9]Contrary to Western Electric's contention at 5 and 19-20 of its Motion to Dismiss or Affirm, CWA expressly noted before the Colorado District Court in its Opening Brief the apparent inapplicability of the term "collective bargaining unit" to interstate or multi-state employee units, stating that it could not seriously be contended that a multi-state bargaining unit is subject to the administration and control of the State of Colorado in connection with union security. More significantly, however, the Colorado Supreme Court decision herein has definitively construed §8-3-108(1)(c) and has found the union security provisions in question unenforceable because, *inter alia*, all or a portion of the Colorado employees in the federally recognized bargaining units involved did not, prior to negotiation of the disputed union security provisions, constitute themselves as "collective bargaining units."

gaining agreement containing a union security provision but after negotiation thereof. [W.E. Motion at 22, 25] Both deny that "collective bargaining unit" certification is in any fashion inconsistent with §9 rights under the Labor Management Relations Act of 1947, as amended [hereinafter, federal Act], 29 U.S.C. §159. [M.S. Motion at 15; W.E. Motion at 21-22]

CWA would initially reiterate that "collective bargaining unit" certification is not determinative of whether a federally recognized bargaining unit is desirous of approving the prior negotiation and execution of an "all-union" agreement. Such approval is, rather, the function of the "all-union" referendum itself. The "collective bargaining unit" election is, under the Colorado Supreme Court's decision, determinative of whether a particular group of employees has authorized its representative to negotiate, or to attempt negotiation of, a union security provision on its behalf. Without such "collective bargaining unit" certification, admittedly absent in the present case,[10] CWA could not validly enter into the within union security provisions under Colorado law. The requirement of "collective bargaining unit" certification, therefore, directly delimits the authority of CWA to negotiate union security provisions on behalf of those individuals in the federally recognized bargaining units involved in this appeal. Such delimitation of authority is clearly an impermissible intrusion by state law upon federal rights secured under §§7 and 9 of the federal Act, 29 U.S.C. §§157 and 159. Finally, such delimitation of authority is necessarily effected by state regulation prior to the

[10]The State of Colorado stated at 7 of its Jurisidictional Statement that "[p]rior to this decision, the state agency conducted unit certification elections only for those units which were not within the jurisdiction of the National Labor Relations Act. The state did not construe the Act as requiring a state unit certification election, as a prerequisite to an all-union agreement referendum, for units which previously have been certified or recognized by the National Labor Relations Board." See also, App. B at 23.

negotiation *and* execution of the union security provisions involved. *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96, 105 (1963) [hereinafter, *Schermerhorn* II]. Unless "and" is to be equated with the disjunctive "or," even Western Electric's analysis of the timing of "collective bargaining unit" certification places such regulation outside the scope of a state's authority under §14(b) of the federal Act, 29 U.S.C. §164(b).

Expectedly, both Mountain States and Western Electric argue that *Schermerhorn* II and *Algoma Plywood & Veneer Co. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 301 (1949), are dispositive of whether the states may, pursuant to §14(b), regulate the enforcement of union security provisions through a method other than total prohibition. While language in *Algoma* can plausibly be construed to support Mountain States' and Western Electric's position,[11] CWA submits that a more proper and accurate interpretation of *Algoma* is that the State of Wisconsin was deemed therein to have the authority to restrain the discharge of an employee in violation of its law. It was in this context that the language so heavily relied upon by Mountain States and Western Electric is cited with approval in *Schermerhorn* II, *supra* at 104-105.

[11]Mountain States and Western Electric rely upon the following in *Algoma:*

> "It is argued, however, that the effect of [§14(b)] is to displace State law which 'regulates' but does not wholly 'prohibit' agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of this section means that the Act shall not be construed to authorize any 'application' of a union-security contract, such as discharging an employee, which under the circumstances 'is prohibited' by the state, the legislative history of the section would dispel it. . . ." *Id.* at 313.

CONCLUSION

CWA respectfully requests that Mountain States' and Western Electric's Motions to Dismiss or Affirm be denied in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed three copies of the forgeoing BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM, by depositing same in the United States Mail, postage prepaid this _____ day of _____, 19____, addressed as follows:

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